

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 103

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JOE NATHAN COOPER, PETITIONER,

vs.

CALIFORNIA

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF CALIFORNIA

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[fol. 1]

**BEFORE THE GRAND JURY OF THE  
COUNTY OF CONTRA COSTA  
STATE OF CALIFORNIA**

**No. 7744**

**[File Endorsement Omitted]**

**INVESTIGATION OF ALLEGED VIOLATION OF SECTION 11501  
OF THE CALIFORNIA HEALTH AND SAFETY CODE (SALE  
OF HEROIN), AND SECTION 245 OF THE CALIFORNIA  
PENAL CODE (ASSAULT WITH FORCE LIKELY TO PRO-  
DUCE GREAT BODILY INJURY), BY JOE COOPER**

**MARTINEZ, CALIFORNIA, Monday, January 15, 1962**

**HONORABLE DANA F. SPRAGUE, Foreman, and a  
quorum of Grand Jurors,**

**REPORTER'S TRANSCRIPT OF TESTIMONY TAKEN AND PRO-  
CEEDINGS HAD IN HEARING BEFORE THE GRAND JURY—  
filed January 25, 1962**

**APPEARANCES:**

**For the People: Thomas Curtin, Esq.  
Deputy District Attorney  
County of Contra Costa  
State of California**

**Douglas Quinlan, Esq.  
Deputy District Attorney  
County of Contra Costa  
State of California**

[fol. 3]

**PROCEEDINGS**

**THE FOREMAN: (Addressing Court Reporter) You  
do solemnly swear that you will honestly and correctly  
take down in stenotype or shorthand all of the pro-**



ceedings in this matter now pending before this Grand Jury, and that should an indictment be returned in this matter, you will honestly and correctly transcribe your notes in typewriting and file them with the Clerk of this Court, pursuant to law?

THE REPORTER: I do.

THE FOREMAN: The Statement of the matter to be considered and the person to be charged.

At this time it is my duty as Foreman of the Grand Jury to state to all of you who are present that the matter that is to be considered next involves alleged violations of Section 11501 of the California Health and Safety Code, and Section 245 California Penal Code, to-wit, sales of heroin, and assault with force likely to produce great bodily injury.

The person to be charged with the offenses is Joe Cooper, and I further direct any member of the Grand Jury who has a state of mind in reference to the case or to the party named which will prevent you from acting impartially and without prejudice to the substantial rights of the party, to retire.

(No member of the Grand Jury retired)

MR. CURTIN: We are ready to proceed, Mr. Foreman. We will call as our first witness, Mr. Armenta.

STEVEN ARMENTA,

called as a witness before the Grand Jury of the County of Contra Costa, having first been duly sworn, was examined and testified as follows:

[fol. 4]

### DIRECT EXAMINATION

BY MR. CURTIN:

Q Mr. Armenta, your full name and your address, please, for the ladies and gentlemen of the Grand Jury.

A Steven Lawrence Armenta, A-r-m-e-n-t-a, 4127 Irving Street, San Francisco.

Q And what is your business or occupation, sir?

A I am an agent for the Bureau of Narcotic Enforcement, Department of Justice, State of California.

Q How long, sir, have you been an agent for the State Narcotics Bureau, for the State of California?

A Approximately one year.

Q Now, Mr. Armenta, I am going to recall your attention to the 21st of December, 1961, and ask you if you remember that date, sir.

A Yes, sir, I do.

Q And did you on that occasion have occasion to meet a person by the name of Frank Green?

A Yes, sir, I did.

Q Will you tell the ladies and gentlemen of the Grand Jury your occasion for having met that person?

A On the 21st of December, Green was placed under arrest by myself and one of the other agents of our Bureau, and a police officer from the Richmond Police Department.

Q And did you have occasion to meet Mr. Green at the Richmond Police Department?

A Yes, sir, I did.

Q And who else was with you, sir?

A Agent Groom, and I believe it was Officer Stumph of the Richmond Police Department.

Q And sir, did you have occasion to have a conversation with Mr. Frank Green regarding a Joe Cooper?

[fol. 5] A Yes, sir, I did.

Q What did you do in relation to Mr. Frank Green, sir?

A Well, during the course of the interrogation of Green, Cooper came into the conversation, and Green stated that he could purchase narcotics from Cooper.

Q And after you had this conversation with Green, what did you do in relation to Mr. Green?

A We asked Green if he would, if he was willing to make a purchase of narcotics under our supervision that day. And he said he would.

Q And, sir, what did you do then after he agreed to do so?

A Green was then searched by Agent Groom, and he was furnished with twenty dollars State funds.

A federal agent and myself then took Green to the downtown area of Richmond, where he placed a phone call to Cooper's residence.



Q Now, the search made of Mr. Green by Mr. Groom, was that done in your presence?

A Yes, sir, it was.

Q And for the record, who is Mr. Groom?

A He is one of the agents from the Bureau of Narcotics Enforcement, State of California.

Q Was the search completed in your presence, sir?

A Yes, sir, it was.

Q Did you participate or aid in the search?

A No, sir. I was just standing by.

Q Who was the federal agent that went with you and Mr. Green?

A Mr. Lee.

Q And Mr. Lee is a member of the Federal Narcotics Bureau in the San Francisco Office, is he, sir?

A Yes, sir, he is.

[fol. 6] Q Now, then you had accompanied Mr. Green, you said, to a phone?

A Yes, sir.

Q And where was this phone located?

A It was in a parking lot between 10th and 11th Streets on Nevin.

Q In whose vehicle did you go to reach this phone?

A We went in Agent Lee's vehicle.

Q There were then how many of you in the vehicle?

A Three of us.

Q That is yourself, Mr. Lee, and Mr. Green?

A Yes, sir.

Q Then will you tell us what you did at the phone booth?

A Green and I both got in the phone booth, which is fairly cramped, you might say, and I attached what we call a twin phone to the telephone so that I could listen to the conversation, the conversation between the two parties.

Then Green was furnished with a dime and he dropped it in and dialed Cooper's telephone number.

Q Well, sir, will you tell us, did you observe the number being dialed?

A Yes, sir, I did.

Q And what number did you observe being dialed?

A I believe BE 2-1879. Mrs. Gulleys Phone No.

Q And whose number is that, sir, to your knowledge?

A To my knowledge that is Mr. Cooper's number.

Q What knowledge did you have as to where Mr. Cooper lived?

A Well, previously other calls had been placed to that residence, and also we checked out the residence phone number.

Q You had done this of your own personal activity and knowledge, sir?

A Yes, sir.

[fol. 7] Q Had you had occasion to know what address this phone number was at?

A Yes, sir, we did. That was checked out also.

Q What address was that, sir?

A I don't recall the address at this time.

Q Now, Mr. Armenta, did you hear a voice, on the phone when Mr. Green made the call?

A Yes, sir, I did.

Q And what voice, or tell us what you first heard.

A The first voice was a female voice answering the phone, and then Mr. Green asked for Joe. At that time the female voice called to Joe, and then the next voice was, to my knowledge, Joe Cooper's voice.

Q And had you heard that voice prior to that occasion?

A Yes, sir, I had.

Q And after that occasion, did you hear that voice again in some other place?

A Yes, sir. I heard it when Mr. Cooper was being interrogated.

Q Where was he interrogated, sir?

A At the Richmond Police Department.

Q At the time did you recognize his voice to be the voice that was on the phone on this occasion?

A Yes, sir.

Q Now, sir, what was said on the phone at that time by Mr. Cooper and Mr. Green?

A Well, Mr. Green said, "Joe?"

And he said, "Yes."

And he said, "How are things?"

And I believe Cooper said, "All right, I guess."

Then Green said, "How about a deuce?"

And Cooper said, "Yes, all right."

[fol. 8] And then I believe Green said, "What do you want me to do?"

And Cooper kind of hesitated and said, "Let's see", something like that.

And then Green said, "Well, how about Newell's? How about Newell's?"

And Cooper said, "That's as good a place as any."

And then Green said, "Now? Right away?" Something like that.

And Cooper said, "Yes".

Q The phone-number BE 2-1879, is that a Richmond number?

A Yes.

Q And that is in the city of Richmond, County of Contra Costa, State of California?

A Yes, sir.

Q And what is Newell's?

A Newell's is a market. It's a fairly large market, and around the fringe of it there is a bar, and I think, I believe there is a shoe repair shop, I'm not sure.

Q Where is it located?

A That's on 23rd and Cutting, I believe.

Q Is that in the city of Richmond, County of Contra Costa?

A That's all in the city of Richmond.

Q After you and Mr. Green were in the phone booth, tell us what happened next, Mr. Armenta.

A Then we left the phone booth after the telephone call, and we returned to Agent Lee's vehicle. Then we were driven to the vicinity of 23rd and Cutting, where Green left the vehicle and I left after him, and we both walked on opposite sides of the street toward Cutting on 23rd.

Q And then tell us what happened next, Mr. Armenta.

A Green went into the west side of the market where [fol. 9] the parking lot is, and I stood on the corner and observed Green from that point.

Q Now, were there other agents, if you know, of the State Narcotic Bureau present in this area?

A Yes, sir. Agent Groom was also present.

Q Will you tell us where you observed Agent Groom?

A Agent Groom was on the corner of 23rd and Cutting in a vehicle, which he left about the time that we arrived near the parking area. When Green and I arrived near the parking area then Agent Groom left the vehicle and proceeded, that would be west, opposite me. It wasn't on the street, it was a vacant lot behind a fence, to a vantage point where he could observe the parking area.

Q To your knowledge did he also see you, and did you see him?

A Yes, sir.

Q Then tell us what happened next, Mr. Armenta, after you observed Mr. Green go to the parking lot in Newell's Market.

A A short time later I observed Cooper's vehicle, which I knew from before, to drive towards 22nd Street on Cutting, and make a right turn in the area of the parking lot.

Q Did you see how many persons were in that vehicle?

A Just one person.

Q Who was that, sir?

A Joe Cooper.

Q Then will you tell us what happened next, Mr. Armenta?

A At that point after he turned, made the right turn, he went out of my vision for a couple of minutes, and at that time, in that two minutes, after that two minute period had elapsed, Green walked from the parking area towards me again to the corner.

Q And then what did you see Mr. Green do after he walked toward you and the corner, sir?

A He crossed the street, proceeding north on 23rd, [fol. 10] and joined Agent Lee in the vehicle where Agent Lee was waiting.

Q Now, you stated, Mr. Armenta, that you had occasion to see and talk to Mr. Cooper after this occasion?

A Yes, sir.

Q Approximately how long later was it, sir?

A It was the next day when he was interrogated.

Q Who was present there, sir?



A Agent Groom, Agent Lopez, and several officers from the Richmond Police Department.

MR. CURTIN: That's all I have of this witness, Mr. Foreman.

THE FOREMAN: Any questions by members of the Jury?

If not, you may be excused.

HOWARD GROOM,

called as a witness before the Grand Jury of the County of Contra Costa, having first been duly sworn, was examined and testified as follows:

### DIRECT EXAMINATION

BY MR. CURTIN:

Q Mr. Groom, what is your full name and your address, please, for the record?

A Howard W. Groom, 22 Cowper Avenue, Berkeley.

Q And, sir, what is your business or occupation?

A I am an agent of the Bureau of Narcotic Enforcement, State of California.

Q And approximately, sir, how long have you been an agent for the State Narcotic Bureau?

A A little over three years.

Q Mr. Groom, in the course of your duties as an agent for the State Narcotic Bureau, have you become acquainted with a person by the name of Joe Cooper?

[fol. 11] A Yes, sir, I have

Q And will you please identify that person for the ladies and gentlemen of the Grand Jury? Where did that person live when you became acquainted with him?

A He lived in Richmond, 536-20th Street, South 20th Street.

Q South 20th Street? And that is in the city of Richmond?

A Yes.

Q With whom did he live there?

A A relative of his, I believe, by the name of Leona Gully.

Q Did you have occasion, sir, in the course of your

investigation, to become acquainted with the phone number of that residence?

A I knew it at one time. I couldn't tell you the number now.

Q Now, did you know a person by the name of Frank Green?

A Yes, sir.

Q Did you have occasion to see him and be with him on the 21st of December, 1961?

A Yes, sir, I did.

Q And what was the occasion that you had to meet with him on that day, sir?

A I arrested him.

Q What was that for, sir?

A For possession of heroin.

Q And where did you have occasion to meet him on that day?

A Initially I contacted him in his hotel room, where he was placed under arrest.

Q And did you have a conversation with Mr. Green about the person, Mr. Joe Cooper?

A Yes, sir, I did.

Q Will you tell us, was there some agreement reached between you and Mr. Green in regard to Mr. Joe Cooper? [fol. 12] A Mr. Green agreed to attempt to make a purchase of heroin from Mr. Cooper, under my direction.

Q By the way, for the record, Mr. Groom,—I'll withdraw that. Strike that, please.

After this agreement was reached with Mr. Green, what did you do in regard to him, sir?

A Well, he was searched again and supplied with twenty dollars in State funds, marked State funds, and then he went with Agent Armenta, made a phone call. Ultimately met the person, Joe Cooper, purchased two bindles of heroin from him, returned, and turned the evidence over to another agent.

Q Now, Mr. Groom, where were you when Mr. Green accompanied Mr. Armenta? I assume from the Richmond Police Department. Is that correct?

A That is correct.

Q Did you have occasion to observe this?



A Yes, initially. I went down to the parking lot where they were making a phone call. I had contact by radio with Agent Yates, and Officer Stumpf, who had gone down to the vicinity of South 20th Street where Mr. Cooper lived.

They told me that the car was there, and then I gave Armenta the go-ahead to make the phone call.

Q When you say you gave Armenta the go-ahead to make the phone call, who was with him, sir?

A Mr. Green.

Q Did you see anyone else in their vicinity?

A No, sir. The two of them went into the phone booth. There wasn't room for anyone else.

Q Was there a vehicle with someone in it, near that location?

A Agent Lee drove them into the area.

Q Then after you observed the two persons in the phone booth, tell us what you observed next.

[fol. 13] A They came out, and I forget exactly how they informed us that the contact had been made, and they were going immediately to 23rd and Nevin to make the buy.

Q Sir, you said 23rd and Nevin? Where were they going?

A Correction. They were going to 23rd and Cutting.

Q Did you observe them going in this direction?

A Yes, sir. As a matter of fact, Agent Lee didn't know the best way to get there, and he followed us down. We drove.

Q In the vicinity of 23rd and Cutting, tell us what you observed.

A Well, I was with Lt. Sullivan, and they dropped Mr. Green off. We pulled up in a position where we could watch him walk down the street with Armenta following him. He went directly across the street and into the parking lot behind Jack Newell's Market.

Q You say "he", sir? For the record, who is that?

A Mr. Green.

Q And where was Agent Armenta?

A He was following. And then he stood near the curb in front of Jack Newell's Market where he could keep Mr. Green under observation.

Q Mr. Green, you say, went into the parking lot?

A Yes, sir.

Q Will you tell us then what you observed next?

A Well, I got out of the car, and on the north side of Cutting, not exactly on Cutting, there is a house with a porch, it is a two story house. I got up on this porch where I had a fairly clear view of most of the parking lot and could keep Mr. Green under observation, in case he should get out of Agent Armenta's sight.

Q And did something happen while you observed Mr. Green in the parking lot of Newell's?

[fol. 14] A He was just standing there. He stood there for some minutes, and then suddenly he started to move or walk west in the parking lot, and I could see he was going to go out of my view.

I came downstairs from this porch alongside of a building and saw him go up to a car, which I recognized to be the car of Mr. Cooper.

Q And did you see a person in that car, sir?

A There was one person in the car.

Q And then what did you see Mr. Green do up at the car?

A He stood alongside the car on the driver's side for a minute or two, and then walked away.

Q Did you follow or see or observe Mr. Green after he walked away from this car?

A Yes, sir. He walked away. He walked back on the corner of 23rd and Cutting, and started walking north on 23rd.

Q And then where did you go, sir?

A He went up to the next street parallel to Cutting. I believe it is Virginia. I followed him up the street.

He turned the corner, and entered a car with Agent Lee.

Q Now, Mr. Groom, between the time that you had searched Mr. Green at the Richmond Police Department, and the time that he has just reentered the car of Mr. Lee, did you see Mr. Green in the presence of any person other than the person in Mr. Cooper's car at the parking lot, and Agent Armenta and Agent Lee?

A He contacted no one except Mr. Cooper and the agents.

Q Now, sir, after you observed Mr. Green get back in the car with Agent Lee, what did you do next?

A Then I reentered the car with Lt. Sullivan, and we drove back to the parking lot.

At that time we saw the car driving out, and got a good look at Mr. Cooper, whom I readily recognized at that point. We followed him down the street and he stopped to talk to someone. We went down a little further [fol. 15] and we lost sight of him at that time.

Q Did you have occasion to meet or see Mr. Cooper later that day, after this occurrence?

A Yes, sir, I did.

Q And will you tell us where that was, Mr. Groom?

A That was on 7th and Macdonald in Richmond.

Q Will you tell us what occasion you had to be there?

A Well, we located his car parked there, and we waited for him to return to the car.

Q And that is Mr. Cooper?

A Mr. Cooper.

Q And this is the same car that had been in Newell's parking lot when Mr. Green had contacted him?

A That is correct.

Q Tell us what you did after you spotted this car at 7th and Macdonald.

A We just waited there, and eventually Mr. Cooper came back to the car, and when he did, he was placed under arrest.

Q Now, sir, will you tell us how he was placed under arrest?

A Well, he walked up to the car on the passenger side and put the key in the door. At that time I came up on his right side, Agent Yates came up on his left side. Agent Yates showed him a badge and said, "Joe, you're under arrest."

And then we placed him in physical restraint.

Q Tell us what you did, sir.

A Well, I had ahold of his right hand. I took him by the right wrist and Agent Yates by the left wrist, and we were about to handcuff him.

Do you want me to explain this whole thing?

Q Yes.

A Then somehow he got his left hand away from [fol. 16] Agent Yates, reached into his (indicating) right shirt pocket, put his head down and took a package out of his pocket which appeared similar to the package we had earlier gotten back from Mr. Green, and placed it in his mouth.

I attempted to prevent him from placing it in his mouth. I grabbed his hand. He put the package in his mouth, and my finger in with it.

Q Now, sir, prior to your doing that, did Mr. Cooper make any statements or any actions prior to all of this?

A Well, when we first approached him and put him under arrest, and as we seized him by the wrists he bent down and indicated—appeared to be looking into his car, and he said, "It's there, above the sun visor."

Yates asked him, "What's there?"

And he said, "The marijuana."

Agent Yates said, "What marijuana?"

He said, well, he says, "There's marijuana, but I didn't put it there. Somebody else put it there."

And that was all the conversation prior to the incident of putting this thing in his mouth.

Q It was after that that he reached into his pocket with his left hand and put this object in his mouth?

A That's right.

Q Now, what appearance did this object have that he put into his mouth?

A Well, it was a small package wrapped in brown paper.

Q Now, prior to that, had you seen any similar article that day?

A Well, as I said, the two bindles of heroin that Mr. Green purchased from him were also wrapped in brown paper, and the package looked very similar.

Q Now, tell us then what happened when you put [fol. 17] your finger in his mouth in order to retrieve this object.

A Well, I'll have to correct that. I did not put my finger in his mouth. I had no intention of getting my finger in his mouth, but he, he chewed me rather severely, and he wouldn't let go of my finger. I finally had to force it out of his mouth.



Q Did you receive medical attention, sir, for your finger?

A Yes, sir. Immediately after the arrest, I was driven to the Richmond Permanente Hospital where they treated my finger.

Q Tell us what occurred to the finger, as to its physical incapacity, sir.

A Well, it's—initially it was badly lacerated, the entire top surface. And the feeling initially, the first day the feeling was all gone out of it. And still is. The finger is still dead all on the (indicating) right side of the finger from the knuckle up to the tip. And it only bends about halfway. I can't bend it all the way.

Q When you first were able to get your finger out of Mr. Cooper's mouth, what did you observe about it? Or what did you think had happened?

A Well, I thought he had taken the first joint off. It felt like the first joint had come off. I guess that's when the nerves went dead. I looked at it to be sure it was all there.

Q And, sir, you have received medical attention in a hospital for the finger?

A About twice a week I go back and have it checked.

Q You have been doing so since the 21st of December, 1961?

A Yes, sir.

Q Now, Agent Groom, after taking Mr. Cooper into custody at that time, where did you take him, sir?

A At that time he was taken into the station. I did not see him again that day.

Q Did you have occasion to see him on the 22nd of [fol. 18] December, 1961?

A Yes, sir. I interviewed him for awhile on the 22nd.

Q At that time, sir, did you have a conversation with him about the incident of putting something in his mouth?

A Yes, sir.

Q What did he tell you?

A He said that—I asked him what he put in his mouth, and he said it was a marijuana cigarette, and I remarked that it didn't look like a marijuana cigarette.

He said it was because it was folded in half and

wrapped in brown paper, and I kept questioning the fact it was marijuana, and he kept insisting that it was.

Q Now, Mr. Groom, did you have occasion to obtain any objects from Agent Lee of the Federal Narcotic Bureau after you observed Mr. Green came back and get in the car in the vicinity of Newell's Market?

A Yes, sir, I did.

Q And what did you do with the objects you received from Mr. Lee?

A I turned it over to the Richmond criminologist, Mr. Reeves.

Q I show you this envelope, Mr. Groom, and the objects therein, and ask you to identify that for the ladies and gentlemen of the Grand Jury.

A Well, this is the envelope I made up to contain the evidence. And these are the two bindles of evidence in a piece of brown paper in which they were wrapped, which I received from Agent Lee, which he had received from Mr. Green.

Q And then I take it you placed these two bindles in the brown wrapped paper, in the brown envelope that you hold?

A No, sir, it did not happen quite that way. I gave the bindles in their initial form in the brown paper, to [fol. 19] Mr. Reeves. And then a little later I made up the envelope to contain them for evidentiary purposes.

Q Was this done in Mr. Reeves' presence, sir?

A The envelope?

Q Yes.

A Yes, sir.

Q Did Mr. Reeves place them in the envelope in your presence?

A I don't recall if he actually placed them in the envelope in my presence.

Q You gave physical custody of those to Mr. Reeves?

A I gave them to Mr. Reeves.

Q To your knowledge he is the criminologist for the Richmond Police Department?

A That is correct.

Q Where did you deliver them, sir?

A I delivered them to him in his office.

Q At the Hall of Justice?



A In the Hall of Justice in Richmond.

Q This incident regarding your finger occurred at 7th and Macdonald? Is that in the city of Richmond, County of Contra Costa, State of California?

A That is correct.

Q The brown paper that you have told us about, did you have occasion to look in Mr. Cooper's car after detaining him at 7th and Macdonald?

A Yes. It was a day or two later when I looked in the car.

Q And what did you find in regard to this paper, in the car?

A In the glove compartment I found a torn portion of a brown paper bag which is similar in appearance to that paper which contains the evidence.

MR. CURTIN: At this time, Mr. Foreman, may we [fol. 20] have the Secretary of the Grand Jury mark this as People's Exhibit A, with the date and the signature of the Secretary?

THE FOREMAN: Very well.

(A brown manila envelope, Peoples' A)

MR. CURTIN: That is all I have of this witness, Mr. Foreman.

THE FOREMAN: Any further questions?

A JUROR: It wasn't quite clear to me how his finger got into the defendant's mouth.

THE WITNESS: Well, he reached into his pocket, he had the bindle in his hand. He had his head down, he was going to put it in his mouth. I grabbed his hand to try to keep it out. He got everything in at once.

A JUROR: Did you recover that bindle? Or did he swallow it?

THE WITNESS: He swallowed it.

THE FOREMAN: Any further questions?

JOHN LEE,

called as a witness before the Grand Jury of the County of Contra Costa, having first been duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION

BY MR. CURTIN:

Q Mr. Lee, what is your address, please? You have given your name for the record.

A 144 Federal Office Building, San Francisco.

Q What is your business or occupation, sir?

A I am a United States Treasury Agent assigned to the Bureau of Narcotics.

Q And as a Federal Narcotics Agent, sir, have you had occasion to carry on investigations in the city of Richmond, in the latter part of last year, in regard to a Joe Cooper?

A Yes, sir, I did.

Q Mr. Lee, were you familiar with a person by the name of Frank Green?

A Yes, sir, I am.

Q Did you have occasion to be with him on the 21st of December, 1961, a Thursday?

A Yes, sir, I have.

Q Where was that, sir?

A At the Richmond Police Department.

Q And will you tell us the occasion you had to be with him at that place?

A On the 21st of December of 1961 I was present at the Vice Squad detail office at the Richmond Police Department. Also present were State Agents Armenta and Howard Groom, and another Federal Agent by the name of Walter Yates. And the Richmond Police vice officers. Their names escape me now.

At that time Mr. Green agreed to assist both the Federal Agency and the State Agency in initiating a case against his source of supply, one Joseph Cooper.

Q And when this agreement was made—withdraw that.

Did you have a conversation with Mr. Green regarding Mr. Cooper?

A Yes, sir, I did.

Q And did Mr. Green agree to try to obtain narcotics from Mr. Cooper?

A Yes, sir, he did.

Q And after this agreement was reached, what was done in relationship to Mr. Green?

A Agent Howard of the State Bureau of Narcotics searched Mr. Green. Then Agent Armenta and myself took Mr. Green in a government vehicle to the vicinity [fol. 22] of Nevin Street between 10th and 11th Street in Richmond.

They went, Agent Armenta and Mr. Green then went to a public telephone booth, and I observed them making the telephone call.

Q Then what happened after they went to the phone booth, Mr. Lee? Did they return to your car then?

A Yes, sir they did.

Q Where did you go?

A Then Mr. Green informed me to drive to the vicinity of 23rd and Cutting Street in Richmond. I proceeded to do so. Then at approximately near the vicinity of 23rd and Virginia Street, Mr. Green was let out of the government vehicle, and also Mr. Armenta. Agent Armenta also got out of the vehicle. And I proceeded down toward the vicinity of 22nd and Virginia Street and parked there.

Prior to letting Mr. Green out of the government vehicle, I gave him instructions that when the transaction was over with, that he should return to 22nd and Virginia Street.

Q And then did you observe Mr. Green leave, sir?

A Yes, sir.

Q And in which direction did he go?

A He walked towards Cutting Street on 23rd, from Virginia Street.

Q And would that location be Newell's Market, in the city of Richmond?

A Yes, sir.

Q Now, after he left your automobile, could you tell us approximately how long he was gone? Did you have occasion to see him again?

A Approximately fifteen minutes later I observed Mr. Green coming around the corner onto Virginia Street from 23rd. He came directly to where I was parked, entered the vehicle, and a short distance—in a short distance [fol. 23] back of Mr. Armenta—I mean the—excuse me.

Mr. Green came around the corner onto Virginia Street from 23rd. Then in a short distance—in a—back

of Mr. Green, Agent Armenta came. And Mr. Green entered the vehicle, at which time he handed me the two paper bindles.

Q And sir, are you familiar with the containers for narcotics?

A Yes, sir.

Q Will you tell us what you received from Mr. Green, that you observed?

A I received two paper bindles. I believe at that time it was wrapped in a brown paper, which apparently was torn from a brown paper package that you receive when you go to a grocery store.

Q And did you examine the contents of the bindle, sir?

A Not at that time, no, sir.

Q Did you do so at a later time?

A Yes, sir.

Q What did it appear to you to be?

A It appeared to be a brown powdery substance.

Q And Mr. Lee, what did you do with the two bindles that you received from Mr. Green?

A I placed my initials, J. Y. L. on both the bindles, and also on the brown wrapping paper, and at that time I turned the two paper bindles and also the brown paper over to State Agent Howard Groom.

Q And where did you turn it over to Mr. Groom, sir?

A In the vice office detail at the Richmond Police Department.

MR. CURTIN: For the record, may it show that I have torn the seal of the Grand Jury Secretary.

[fol. 24] BY MR. CURTIN:

Q Would you examine these, sir, and tell us if you can identify the bindles as the bindles you turned over to Mr. Groom?

A (Examining) Yes, sir. This is the—two paper bindles that I received from Mr. Green. My initials, J. Y. L., and the date 12-21-61. And also the brown paper wrapper, J. Y. L., 12-21-61.

Q Thank you, sir.

MR. CURTIN: That is all I have of this witness, Mr. Foreman.

**THE FOREMAN:** Any members of the Jury have, any questions?

If not, you may be excused. Thank you, sir.

**MR. CURTIN:** Call Mr. Hillard Reeves.

**HILLARD REEVES,**

called as a witness before the Grand Jury of the County of Contra Costa, having first been duly sworn, was examined and testified as follows:

**DIRECT EXAMINATION**

**BY MR. CURTIN:**

**Q** Mr. Reeves, your full name and your address, please, for the record?

**A** Hillard M. Reeves, 2433 Downer Avenue, Richmond.

**Q** What is your business or occupation, sir?

**A** Criminalist for the Richmond Police Department.

**Q** Will you state for the record your training, experience, and background as a criminalist for the Richmond Police Department?

**A** I graduated from the University of California in 1949 with a degree of criminology. I have been working as criminalist for about ten years now.

**Q** And does your experience and training include the [fol. 25] analyzation of narcotic substances such as heroin and marijuana?

**A** Yes, it does.

**Q** And have you had chemical training in that regard, sir?

**A** Yes, I have.

**Q** And have you testified in Superior Court as an expert on those subjects?

**A** Yes, I have.

**Q** I will show you an envelope marked Peoples' A, and ask you, sir, if you can identify that envelope and its contents?

**A** (Examining) Yes, sir, I can.

**Q** Will you tell us how you can identify those objects, sir, contained in that envelope marked Peoples' A?



A The small piece of brown paper has my name on it and the date that I received it.

And the two papers, folded papers have my initial, and I have them numbered.

Q From whom did you receive those objects, sir, the brown paper, the two objects which are contained in the manila envelope?

A I received those from Agent Groom of the Bureau of Narcotic Enforcement.

Q Where did he hand those to you?

A In the crime lab of the Richmond Police Department.

Q Did you have occasion to analyze the matter contained, if any, in the bindles of paper that he handed to you on that day?

A Yes, I have.

Q And what did you analyze the matter to be, sir?

A I found white powder in both of the folded papers, and this white powder contained heroin.

Q And have those objects been in your possession since that time they were handed to you by Agent Groom?

A Yes, sir, they have.

Q Did you bring them here to this courtroom before [fol. 26] the Grand Jury today, sir?

A Yes, I did.

MR. CURTIN: At this time, Mr. Foreman, may we ask that Peoples' A and the contents be returned to this witness to keep in his possession?

THE FOREMAN: Yes.

MR. CURTIN: That's all I have of this witness, Mr. Foreman.

THE FOREMAN: Any questions from the Jury?

MR. CURTIN: At this time, Mr. Foreman, may the record show that we are retiring from the room, together with the Court Reporter, and submitting the matter to the Grand Jury for decision.

[fol. 27]

[CERTIFICATE OF CERTIFIED SHORTHAND REPORTER  
(Omitted in Printing)]



[fol. 28]

IN THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA IN AND FOR THE COUNTY OF  
CONTRA COSTA

No. 7744

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

JOE COOPER, DEFENDANT

MOTION TO SET ASIDE INDICTMENT—February 9, 1962

COMES NOW WAYNE A. WESTOVER, JR., and moves to set aside the Indictment returned by the Grand Jury of this County on the 15th day of January, 1962, on the grounds that the defendant has been indicted without reasonable or probable cause; more particularly, the testimony presented to the Grand Jury was largely hearsay evidence and other portions of the testimony was otherwise incompetent evidence.

This Motion will be based on the pleadings and documents in the file and on oral testimony to be presented at the time of hearing.

Dated this 9th day of February, 1962.

CALFEE &amp; WESTOVER

By WAYNE A. WESTOVER, JR.  
Attorneys for Defendant.

## POINTS &amp; AUTHORITIES:

People vs. Soto, 144 CA2d, 295

"When the only evidence produced against the defendant is incompetent and inadmissible, then there exists no reasonable or probable cause to hold him to answer."

[fol. 29]

**IN THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA, IN AND FOR THE COUNTY OF  
CONTRA COSTA**

[File Endorsement Omitted]

**INDICTMENT—filed January 15, 1962**

**CLERK'S RECORD**

**IN THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA, IN AND FOR THE COUNTY OF  
CONTRA COSTA, the 15th day of January, 1962.**

The defendant, JOE COOPER, is accused by the Grand Jury of the County of Contra Costa, State of California, by this indictment of the crimes of felonies, (Two Counts) to wit: VIOLATION OF SECTION 11501 HEALTH AND SAFETY CODE OF THE STATE OF CALIFORNIA (Sale of Heroin), and VIOLATION OF SECTION 245 PENAL CODE OF THE STATE OF CALIFORNIA (Assault with force likely to produce Great Bodily Injury).

In that on or about the 21st day of December, 1961, A.D., at Richmond, in the County of Contra Costa, State of California, the defendant, JOE COOPER, did wilfully, unlawfully, feloniously sell, furnish and give away a preparation of Heroin, in violation of Section 11501 Health and Safety Code of the State of California.

COUNT TWO: For a further and separate cause of action, being a different offense from but connected in its [fol. 30] commission with the charge set forth in Count One hereof, the said JOE COOPER, is accused by the Grand Jury of and for the County of Contra Costa State of California, by this indictment of the crime of violation of Section 245 Penal Code of the State of California, a felony, committed as follows: That the said JOE COOPER, on or about the 21st day of December, 1961, at and in the County of Contra Costa, State of California, did wilfully, unlawfully and feloniously assault HOWARD

GROOM, a human being, by means of force likely to produce great bodily injury.

Dated this 15th day of January, 1962.

JOHN A. NEJEDLY,  
District Attorney in and for the  
County of Contra Costa, State of  
California.

/s/ By THOMAS F. CURTIN  
Deputy District Attorney

Witnesses sworn and examined  
before the Grand Jury:

Steven L. Armenta  
Howard Groom  
John Lee  
Hillard Reeves

[fol. 31]

IN THE SUPERIOR COURT OF CONTRA COSTA  
COUNTY

[File Endorsement Omitted]

[Title Omitted]

MINUTE ENTRY OF ARRAIGNMENT—January 29, 1962

The defendant, with his counsel Wayne Westover, and the District Attorney by M. B. Veale, Deputy, appear in open Court at this time, this being the time fixed by the Court for the Arraignment of the defendant on the Indictment heretofore filed herein.

Thereupon the Court informs the defendant of the charges brought against him, of his right to a hearing, of his right to be represented by counsel at all times herein.

Thereupon the defendant is arraigned in the following manner, to-wit: a true copy of the Indictment is handed the defendant by the Clerk. The defendant waives the reading of the Indictment and states that he is charged therein by his true name.

Upon motion of the defendant, it is by the Court ordered that the time for the defendant to enter a plea herein be continued to Monday, February 5, 1962 at 9:30 o'clock a.m.

[fol. 32] Defendant is remanded to the custody of the Sheriff.

[fol. 33]

IN THE SUPERIOR COURT OF CONTRA COSTA  
COUNTY.

[File Endorsement Omitted]

[Title Omitted]

MINUTE ORDER—HEARING ON MOTION TO DISMISS—  
February 5, 1962

The defendant with his counsel Wayne Westover and the District Attorney by M. B. Veale, deputy, appear in open Court at this time and the Court fixes this as the time for hearing the motion of the defendant.

Thereupon the defendant moves the Court to dismiss the Indictment herein against the defendant on grounds as set forth in Section 995, California Penal Code and specifically on the grounds that there is not reasonable or probable cause to charge the defendant with the offense herein.

Thereupon it is by the Court ordered that the hearing on said motion be set for Tuesday, February 13, 1962 at 9:30 o'clock a.m.

Defendant is remanded to the custody of the Sheriff.



[fol. 34]

MINUTE ORDER—HEARING ON MOTION TO DISMISS—  
February 13, 1962

The defendant with his counsel Wayne Westover and the District Attorney by Thomas Curtin, Deputy, appear in open Court at this time, this being the time fixed by the Court for the hearing of defendant's motion to dismiss the indictment herein.

Upon stipulation of counsel, it is by the Court ordered that the hearing on this motion be continued to Monday, February 19, 1962 at 9:30 o'clock a.m.

The defendant is remanded to the custody of the Sheriff.

[fol. 35]

MINUTE ORDER—HEARING ON MOTION TO DISMISS  
SUBMITTED—February 19, 1962

The defendant with his counsel Wayne Westover and the District Attorney by Thomas Curtin, deputy, appear in open Court at this time, this being the time fixed by the Court for the hearing on the Motion to Dismiss the information herein.

Said motion is argued to the Court by respective counsel and submitted for consideration and decision and it is by the Court ordered that said motion stand submitted.

[fol. 36]

IN THE SUPERIOR COURT OF CONTRA COSTA  
COUNTY

MINUTE ORDER OF DENIAL OF MOTION TO DISMISS AND  
PLEA—February 26, 1962

The defendant with his counsel Thomas Sheahan and the District Attorney by Thomas Curtin, deputy, appear

in open Court at this time, this being the time fixed by the Court for hearing the motion of the defendant to dismiss the indictment herein.

Thereupon counsel for the respective parties argue the motion to dismiss and the matter is submitted to the Court for consideration and decision and the Court having fully considered the same and being duly advised in the premises, orders that said motion be denied.

Thereupon the defendant enters a plea of Not Guilty of the offense as charged in Count One of the Indictment and enters a plea of Not Guilty of the offense as charged in Count Two of the Indictment.

Upon motion of the District Attorney and the defendant consenting thereto, it is by the Court ordered that the trial of this cause be set for April 10, 1962 at 10 o'clock a.m.

[fol. 37]

IN THE SUPERIOR COURT OF CONTRA COSTA  
COUNTY

[File Endorsement Omitted]

ORDER GRANTING MOTION TO WITHDRAW AS ATTORNEY—  
March 5, 1962

The motion of WAYNE A. WESTOVER, JR., of CALFEE & WESTOVER, for the order hereinafter made came on regularly to be heard this day, and the defendant Joe Cooper having appeared,

Upon proof being made to the satisfaction of the Court, and good cause appearing therefor,

IT IS ORDERED that CALFEE & WESTOVER are hereby permitted to withdraw as attorneys for JOE COOPER, defendant herein.

Dated this 5th day of March, 1962.

/s/ HUGH H. DONOVAN  
Judge of the Superior Court.

[fol. 38]

IN THE SUPERIOR COURT OF CONTRA COSTA  
COUNTY

\* \* \*

MINUTE ORDER APPOINTING COUNSEL—March 12, 1962

The defendant with his counsel Robert H. Moran and the District Attorney by M. B. Veale, deputy, appear in open Court at this time, this being the time fixed by the Court for the defendant to name an attorney to represent him herein.

Thereupon the defendant informs the Court that Robert H. Moran will represent the defendant in these proceedings.

The defendant is remanded to the custody of the Sheriff.

[fol. 39]

IN THE SUPERIOR COURT OF CONTRA COSTA  
COUNTY

[File Endorsement Omitted]

\* \* \*

AMENDED INDICTMENT—Filed April 12, 1962

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF CONTRA COSTA, the 23rd day of March, 1962.

The defendant, JOE COOPER, is accused by the Grand Jury of the County of Contra Costa, State of California, by this indictment of the crimes of felonies, (Two Counts) to wit: VIOLATION OF SECTION 11501 HEALTH AND SAFETY CODE OF THE STATE OF CALIFORNIA (Sale of Heroin), and VIOLATION OF SECTION 245 PNEAL CODE OF THE STATE OF CALIFORNIA (Assault With Force Likely to Produce Great Bodily Injury).

In that on or about the 21st day of December, 1961, A. D., at Richmond, in the County of Contra Costa, State of California, the defendant, JOE COOPER, did wilfully, unlawfully, feloniously sell, furnish and give away a preparation of Heroin, in violation of Section 11501 Health and Safety Code of the State of California.

COUNT TWO: For a further and separate cause of [fol. 40] action, being a different offense from but connected in its commission with the charge set forth in Count One hereof, the said JOE COOPER, is accused by the Grand Jury of and for the County of Contra Costa, State of California, by this indictment of the crime of violation of Section 245 Penal Code of the State of California, a felony, committed as follows: That the said JOE COOPER, on or about the 21st day of December, 1961, at and in the County of Contra Costa, State of California, did wilfully, unlawfully and feloniously assault HOWARD GROOM a human being, by means of force likely to produce great bodily injury.

PRIOR CONVICTION: That before the commission of the offense hereinbefore set forth in this indictment, said defendant JOE COOPER, was in the Superior Court of the State of California, in and for the County of Los Angeles, convicted of the crime of Violation of Section 11500 Health and Safety Code of the State of California (Sale of Narcotics), a felony, and the judgment of said court against said defendant in said connection was, on or about the 26th day of December, 1957 pronounced and rendered, and said defendant served a term of imprisonment therefor in the State Prison.

PRIOR CONVICTION: That before the commission of the offense hereinbefore set forth in this indictment, said defendant, JOE COOPER, was in the Superior Court of the State of California, in and for the County of Los Angeles, convicted of the crime of Violation of Section 501 of the Vehicle Code of the State of California [fol. 41] (Felony Drunk Driving), a felony, and the judgment of said court against said defendant in said connection was, on or about the 26th day of December, 1957 pronounced and rendered, and said defendant served a term of imprisonment therefor in the State Prison.



Dated this 23rd day of March, 1962.

JOHN A. NEJEDLY,  
District Attorney in and for the  
County of Contra Costa, State of  
California

/s/ By THOMAS F. CURTIN  
Deputy District Attorney

Witnesses sworn and examined  
before the Grand Jury:

Steven L. Armenta  
Howard Groom  
John Lee  
Hillard Reeves

[fol. 42]

IN THE SUPERIOR COURT OF CONTRA COSTA  
COUNTY

\* \* \* \* \*  
MINUTE ORDERS OF TRIAL—April 10, 11, 12, 1962

The defendant with his counsel, Robert H. Moran and the District Attorney, by Thomas F. Curtin, Deputy District Attorney, appear in open Court at this time, this being the time fixed by the Court for the trial of the above cause. At this time the defendant waives trial by jury and the District Attorney consenting thereto, the trial of the said cause proceeds before the Court sitting without a jury.

Upon motion of the defendant, it is by the Court ordered that all witnesses be excluded from the Court room until called, except that Sergeant Groom may remain on behalf of the People.

The people call Steven Lawrence Armenta, Howard W. Groom and Thomas Flint, Jr. who are sworn and testify herein and the People introduce in evidence the following exhibits, to-wit:

- No. 1: Photograph showing phone booth
- [fol. 43] No. 2: Photograph showing Newell's Market
- No. 3: Photograph showing 23rd St. facing Cutting
- No. 4: Brown manila envelope containing two bindles of white powder and piece of brown paper for identification
- No. 5: Photograph showing northwest corner of 7th and Macdonald Streets
- No. 6A and 6B: Photographs showing finger of Sergeant Groom
- No. 7: Marijuana seed and brown manila envelope for identification

and the defendant introduces in evidence the following exhibits, to-wit:

- No. 1: Photograph looking West across 23rd Street
- No. 2: Photograph looking South across Cutting Blvd.

Thereupon the further trial of the within cause is continued to Wednesday, April 11, 1962 at 10 o'clock A.M.; and all witnesses heretofore subpoenaed for this trial are by the Court ordered to return at that time.

The defendant is remanded to the custody of the Sheriff.

[fol. 44]

April 11, 1962

The defendant with his counsel and the District Attorney by Thomas F. Curtin being present in open Court at this time, the further trial of the above cause is resumed.

The People call Howard W. Groom, Norman Wesley Sullivan, Leona Gulley, John Lee, Hillard M. Reaves,

Louis Stumpf, Walter T. Yates and Orville L. Billingsley who are sworn and testify herein and the People introduce into evidence the following exhibits, to-wit:

- No. 4: Heretofore introduced for identification
- No. 7: Heretofore introduced for identification
- No. 8: Photograph showing East side of S. 20th St., and Cutting
- No. 9: Photograph showing South 20th & Cutting looking toward Newell's Market
- No. 10: Tape and Box dated December 22, 1961 of Joe Cooper

[fol. 45] The People rest.

Thereupon the defendant moves the Court for dismissal of the within cause upon the grounds as taken down by the Official Court Reporter and said matter is argued to the Court by counsel and is submitted to the Court for consideration and decision and said motion is by the Court denied.

Thereupon it is by the Court ordered that the further trial of the within cause be and the same is hereby continued to Thursday, April 12, 1962 at 10:00 a.m.

[fol. 46]

April 12, 1962

The defendant with his counsel and the District Attorney by Thomas F. Curtin being present in open Court at this time, the further trial of the within cause is resumed.

The defendant calls Joe Cooper who is sworn and testifies herein.

The defendant rests.

The People introduce in evidence the following exhibit, to-wit;

No. 11: Picture of Joe Cooper

The People move the Court for permission to file an amended indictment which includes two prior felony convictions and upon order of the Court said amended indictment is filed.

5  
An amended indictment having been filed herein, the Court fixes this as the time for arraignment of the defendant upon said amended indictment; and with consent of the defendant said defendant is arraigned upon the amended indictment in the following manner, to-wit: [fol. 47] a true copy of the amended indictment is delivered to the defendant by the Clerk. The defendant waives the reading of the amended indictment and states that he is charged in the indictment by his true name. The defendant pleads that he is not guilty of the offense charged in Count One of the amended indictment, to-wit: violation of Section 11501 Health and Safety Code of the State of California (Sale of Heroin); and the defendant pleads that he is not guilty of the offense charged in Count Two of the amended indictment, to-wit: violation of Section 245 Penal Code of the State of California (Assault with force likely to produce great bodily injury).

Thereupon the defendant admits to the conviction in the Superior Court of the State of California, in and for the County of Los Angeles for the crime of Violation of Section 11500 Health and Safety Code of the State of California (Sale of Narcotics, a felony, and the judgment of said court against said defendant on or about the 26th day of December, 1957 and of having served a term of imprisonment therefor in the State Prison; and the defendant further admits to the conviction in the Superior Court of the State of California, in and for the County of Los Angeles of the crime of Violation of Section 501 of the Vehicle Code of the State of California (Felony Drunk Driving), a felony, and the judgment of said Court against the defendant on or about the 26th day of December, 1957 and of having served a term of imprisonment therefor in the State Prison.

[fol. 48] The People rest; the Defendant rests.

Thereupon the matter is submitted to the Court for consideration and decision and the Court having fully considered the same and being duly advised in the premises finds that the defendant Joe Cooper is guilty of violation of Section 11501 Health and Safety Code of the State of California (Sale of Heroin) as charged in Count



One of the amended indictment; and the Court further finds that the defendant Joe Cooper is guilty of the lesser and included offense of simple assault as charged in Count Two of the amended indictment.

It is ordered that the matter of probation for the defendant be referred to the Probation Officer for investigation and a report. The defendant waives the statutory time for hearing the report of the Probation Officer. It is further ordered that the time for hearing the report of the Probation Officer and the time for pronouncing judgment and sentence against the defendant be continued to and set for Monday, May 7, 1962 at 1:30 o'clock p.m.

The defendant is remanded to the custody of the Sheriff.

[fol. 49]

# IN THE SUPERIOR COURT OF CONTRA COSTA COUNTY

## MINUTE ORDER—PROBATION REPORT AND SENTENCE— May 7, 1962

The defendant with his counsel Robert H. Moran, and the District Attorney by Donald R. Walker, Deputy District Attorney, appear in open Court at this time, this being the time fixed by the Court for hearing the report of the Probation Officer in the matter of probation for the defendant and the time for pronouncing judgment and sentence against the defendant.

The Court having read and fully considered the report of the Probation Officer and being duly advised in the premises orders that the defendant be and he is hereby denied probation.

The defendant then states to the Court that he was no legal cause to show why judgment should not be pronounced against him, and no sufficient cause appears or is shown to the Court.

The Court thereupon proceeds to and does pronounce judgment and sentence against the defendant; and it is by the Court ordered that the defendant Joe Nathan

Cooper is Guilty of the crime of Violation of Section 11501 of the California Health and Safety Code (sale [fol. 50] of Heroin), on Count One of the Amended Indictment, and that he be punished by imprisonment in the State Prison of California, and that the Sheriff of Contra Costa County deliver the defendant into the custody of the Director of Corrections at the California Medical Facility, at Vacaville, California.

It is further ordered that the defendant Joe Nathan Cooper is Guilty of the crime of Violation of Section 240, Penal Code of the State of California (Assault), on Count Two of the Amended Indictment, and that he be punished by imprisonment in the Contra Costa Jail for a period of six (6) months.

It is further ordered that the defendant Joe Nathan Cooper suffered the prior conviction for the crime of Sale of Narcotics, a felony, in the Superior Court of the State California, in and for the County of Los Angeles, and of pronouncement of judgment thereon on or about the 26th day of December, 1957; and the prior conviction for the crime of Felony Drunk Driving, a felony in the Superior Court of the State of California, in and for the County of Los Angeles, and of the pronouncement of judgment thereon on or about the 26th day of December, 1957.

It is further ordered that the sentences imposed on Counts One and Two of the Amended Indictment run CONCURRENTLY.

It is further ordered that the sentences imposed on Counts One and Two of the Amended Indictment run [fol. 51] CONCURRENTLY with the term the defendant is currently serving.

The defendant thereupon gives oral notice of appeal from the judgment of the Court. Counsel for defendant moves the Court for an order of withdrawal as counsel in the within cause and said motion is by the Court granted upon the filing of Notice of Appeal.

The defendant is remanded to the custody of the Sheriff of the County of Contra Costa to be by said Sheriff delivered into the custody of the Director of Corrections at the California Medical Facility, at Vacaville, California.

IN THE SUPERIOR COURT OF CONTRA COSTA  
COUNTY STATE OF CALIFORNIA

No. 7744

May 7, 1962

Present, Hon. NORMAN A. GREGG, Judge

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

JOE NATHAN COOPER

Convicted of Violation of Section 11501, Health and Safety Code; and Violation of Section 240 of the Penal Code

The District Attorney, with the defendant and his counsel, Robert H. Moran came into Court. The defendant was duly informed by the Court of the indictment found against him on the 15th day of January, 1961 for the crime of: Violation of section 11501 of the California Health and Safety Code (sale of Heroin); and Violation of Section 245 of the California Penal Code (assault with force likely to produce great bodily injury; of the amended indictment found against him on the 12th day [fol. 52] of April, 1962 for the crime of: Violation of section 11501 of the California Health and Safety Code (sale of Heroin); and Violation of Section 245 of the California Penal Code (assault with force likely to produce great bodily injury; of a prior conviction for the crime of Sale of Narcotics, a felony, in the Superior Court of the State of California, in and for the County of Los Angeles, and of pronouncement of judgment thereon on or about the 26th day of December, 1957; and of a prior conviction for the crime of Felony Drunk Driving, a felony, in the Superior Court of the State of California, in and for the County of Los Angeles, and of the pronouncement of judgment thereon on or about the 26th day of December, 1957; of his arraignment on the amended indictment and of his pleas of "NOT GUILTY

of the Offenses Charged"; on the 12th day of April, 1962, to-wit: NOT GUILTY of the crime of Violation of Section 11501, California Health and Safety Code (Sale of Heroin) on Count One of the Amended Indictment; and NOT GUILTY of the crime of Violation of Section 245 of the California Penal Code (Assault with force likely to Produce Great Bodily Injury); of his admitting the prior conviction of Sale of Narcotics, a felony and of his admitting the prior conviction of felony drunk driving, a felony, as hereinabove set forth; of his trial before the Court sitting without a jury, and the verdicts of the Court on the 12th day of April, 1962, to-wit: Guilty of Violation of Section 11501, Health and Safety Code of the State of California (Sale of Heroin) as charged in Count One of the amended indictment; and [fol. 53] Guilty of Violation of Section 240 of the Penal Code of the State of California (Assault) the lesser and included offense as charged in Count Two of the Amended indictment; of the matter of probation for the defendant being referred to the Probation Officer for investigation and a report; of the denial by the Court of probation for the defendant on the 7th day of May, 1962.

The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him to which he replied that he had none. And no sufficient cause being shown or appearing to the Court, thereupon the Court renders its judgment:

That whereas the said Joe Nathan Cooper having been duly convicted in this Court of the crime of Violation of Section 11501, Health and Safety Code of the State of California (Sale of Heroin) on the Count One of the Amended Indictment; and having been duly convicted in this Court of the crime of Violation of Section 240, Penal Code of the State of California (Assault) on Count Two of the Amended Information; and having suffered the prior convictions and pronouncements of judgment for Sale of Narcotics, a felony and Felony Drunk Driving, a felony, as hereinabove set forth,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, That the said Joe Nathan Cooper is guilty of the crime of Violation of Section 11501 Health and



Safety Code of the State of California (Sale of Heroin) on Count One of the Amended Indictment, and that he [fol. 54] be punished by imprisonment in the State Prison of California; and IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said Joe Nathan Cooper is guilty of the crime of Violation of Section 240 Penal Code of the State of California (Assault) on Count Two of the Amended Indictment and that he be punished by imprisonment in the Contra Costa County jail for a period of six (6) months.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the sentence imposed on Counts One and Two of the Amended Indictment run CONCURRENTLY; and that both sentences run CONCURRENTLY with the term defendant is currently serving.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Sheriff of Contra Costa County deliver the defendant into the custody of the Director of Corrections at the California Medical Facility, at Vacaville, California.

The defendant was then remanded to the custody of the Sheriff of Contra Costa County to be by him delivered into the custody of the Director of Corrections at the California Medical Facility at Vacaville, California.

[fol. 55]

IN THE SUPERIOR COURT OF CONTRA COSTA  
COUNTY STATE OF CALIFORNIA

[File Endorsement Omitted]

[Title Omitted]

COMMITMENT—May 7, 1962

The District Attorney, with the defendant and his counsel, Robert H. Moran came into Court. The defendant was duly informed by the Court of the indictment found against him on the 15th day of January, 1961 for

the crime of: Violation of section 11501 of the California Health and Safety Code (sale of Heroin); and Violation of Section 245 of the California Penal Code (assault with force likely to produce great bodily injury; of the amended indictment found against him on the 12th day of April, 1962 for the crime of: Violation of Section 11501 of the California Health and Safety Code (sale [fol. 56] of Heroin); and Violation of Section 245 of the California Penal Code (assault with force likely to produce great bodily injury; of a prior conviction for the crime of Sale of Narcotics, a felony, in the Superior Court of the State of California, in and for the County of Los Angeles, and of pronouncement of judgment thereon on or about the 26th day of December, 1957; and of a prior conviction for the crime of Felony Drunk Driving, a felony, in the Superior Court of the State of California, in and for the County of Los Angeles, and of the pronouncement of judgment thereon on or about the 26th day of December, 1957; of his arraignment on the amended indictment and of his pleas of "NOT GUILTY of the Offenses Charged"; on the 12th day of April, 1962, to-wit: NOT GUILTY of the crime of Violation of Section 11501, California Health and Safety Code (Sale of Heroin) on Count One of the Amended Indictment; and NOT GUILTY of the crime of Violation of Section 245 of the California Penal Code (Assault with force likely to Produce Great Bodily Injury); of his admitting the prior conviction of Sale of Narcotics, a felony and of his admitting the prior conviction of felony drunk driving, a felony, as hereinabove set forth; of his trial before the Court sitting without a jury, and the verdicts of the Court on the 12th day of April, 1962, to-wit: Guilty of Violation of Section 11501 Health and Safety Code of the State of California (Sale of Heroin) as charged in Count One of the amended indictment; and Guilty of Violation of Section 240 of the Penal Code of the State of [fol. 57] California (Assault) the lesser and included offense as charged in Count Two of the amended indictment; of the matter of probation for the defendant being referred to the Probation Officer for investigation and a report; of the denial by the Court of probation for the defendant on the 7th day of May, 1962.

The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him to which he replied that he had none. And no sufficient cause being shown or appearing to the Court, thereupon the Court renders its judgments:

That whereas the said Joe Nathan Cooper having been duly convicted in this Court of the crime of Violation of Section 11501, Health and Safety Code of the State of California (Sale of Heroin) on Count One of the Amended Indictment; and having been duly convicted in this Court of the crime of Violation of Section 240, Penal Code of the State of California (Assault) on Count Two of the Amended Information; and having suffered the prior convictions and pronouncements of judgment for Sale of Narcotics, a felony and Felony Drunk Driving, a felony, as hereinabove set forth.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, That the said Joe Nathan Cooper is guilty of the crime of Violation of Section 11501 Health and Safety Code of the State of California (Sale of Heroin) on Count One of the Amended Indictment, and that he be punished by imprisonment in the State Prison of California; and IT IS FURTHER ORDERED, AD- [fol. 58] JUDGED AND DECREED that the said Joe Nathan Cooper is guilty of the crime of Violation of Section 240 Penal Code of the State of California (Assault) on Count Two of the Amended Indictment and that he be punished by imprisonment in the Contra Costa County jail for a period of six (6) months.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the sentence imposed on Counts One and Two of the Amended Indictment run CONCURRENTLY; and that both sentences run CONCURRENTLY with the term defendant is currently serving.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Sheriff of Contra Costa County deliver the defendant into the custody of the Director of Corrections at the California Medical Facility, at Vacaville, California.

The defendant was then remanded to the custody of the Sheriff of Contra Costa County to be by him delivered into the custody of the Director of Corrections at the California Medical Facility at Vacaville, California.

OFFICE OF THE COUNTY CLERK )  
COUNTY OF CONTRA COSTA )

I, NORMAN A. GREGG, Judge of the Superior Court, and I, W. T. PAASCH, County Clerk of the County of Contra Costa, and Clerk of the Superior Court thereof, do hereby certify the foregoing to be a full, true and correct copy of the judgment entered on the minutes of the said Superior Court of the County of Contra Costa, State of California, on the 7th day of May, 1962, in the above entitled cause.

[fol. 59]

/s/ NORMAN A. GREGG  
Judge of the Superior Court of  
the State of California, in and  
for the County of Contra Costa

\* \* \* \*

[fol. 60]

IN THE SUPERIOR COURT OF CONTRA COSTA  
COUNTY

[File Endorsement Omitted]

\* \* \* \*

NOTICE OF APPEAL—Filed May 7, 1962

I, JOE NATHAN COOPER, Defendant herein, hereby give notice that I am appealing the judgment entered in the above-captioned matter on May 7th, 1962.

/s/ JOE N. COOPER



[fol. A]

IN THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA IN AND FOR THE COUNTY OF  
CONTRA COSTA

No.

THE PEOPLE OF THE STATE OF CALIFORNIA,  
PLAINTIFF AND RESPONDENT

-vs-

JOE COOPER, DEFENDANT AND APPELLANT

REPORTER'S TRANSCRIPT

HON. NORMAN A. GREGG, JUDGE.

APPEARANCES:

STANLEY MOSK, Attorney General of the State of  
California;

JOHN A. NEJEDLY, District Attorney, Contra Costa  
County,

Hall of Records, Martinez, California,

By: THOMAS CURTIN, Deputy District Attorney,  
Attorney for the People and Respondent;

ROBERT H. MORAN, Attorney at Law,  
Financial Center Building,  
Oakland, California,  
Attorney for the Defendant and Appellant.

[fol. 4]

April 10, 1962, 1:30 o'clock p.m.

PROCEEDINGS

COLLOQUY BETWEEN COURT AND COUNSEL

THE COURT: People versus Joe Cooper.

MR. CURTIN: That's ready on behalf of the People,  
Your Honor.

MR. MORAN: Ready for the defense, Your Honor.

THE COURT: Mr. Curtin, I wasn't, of course, familiar with what happened at the arraignment in this matter, but I was wondering about a waiver of a jury. Do you know what the record shows?

MR. CURTIN: I don't know if that's been formally entered, Your Honor.

MR. MORAN: It hasn't been done, but we're prepared to do so at this time.

THE COURT: All right.

Mr. Cooper this matter has been set for trial at this time without the presence of a jury. I assume you have discussed this with your attorney. Do you waive a jury?

DEFENDANT COOPER: Yes, Your Honor.

THE COURT: Do you join in the waiver, Mr. Moran?

MR. MORAN: I do.

THE COURT: The District Attorney?

MR. CURTIN: Yes, Your Honor.

THE COURT: You may sit down.

Let the record show, then, that a trial by jury is waived in this matter.

[fol. 5] I have read the information of the indictment. I have not read the transcript.

Do you wish to make any statement? If not, you may call your first witness.

MR. CURTIN: We wish to call our first witness and proceed.

MR. MORAN: If the Court please, before this is done may we have an order excluding witnesses.

THE COURT: Yes. Who will be your first witness?

MR. CURTIN: We'll call Mr. Armenta as our first witness. Within the discretion of the Court, I was going to ask if we might have one officer, Howard Groom, present. He will be the second witness.

THE COURT: All right.

All other witnesses in the matter now on trial will remove themselves from the courtroom, but remain near the doorway so we may call you.

Mr. Curtin, there are two ladies in the courtroom. Are either of them witnesses of yours?

Are either of you witnesses in this case?

MR. CURTIN: They have been subpoenaed, I believe, Your Honor, and they should stay outside the courtroom.

THE COURT: All right. Would you remain outside the doorway of the courtroom, please, until you are called in.

I think also, Mr. Moran, there is an order relieving Mr. Westover as attorney of record. And I think the [fol. 6] record should show that you are the attorney of record.

MR. MORAN: Perhaps it hasn't. I had appeared before Judge Donovan a couple of weeks ago, and—

THE COURT: Your appearance has been entered.

MR. MORAN: It has been entered.

THE COURT: Fine.

#### STEVEN LAURANCE ARMENTA,

called as a witness on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE COURT: Just have a seat, Mr. Armenta. That's A-r-m-e-n-t-a?

THE WITNESS: Yes, sir.

#### DIRECT EXAMINATION

BY MR CURTIN: Q. Mr. Armenta, what is your address, please, for the record?

A. 4127 Irving Street, San Francisco.

Q. Mr. Armenta, what is your occupation?

A. I'm an agent for the Bureau of Narcotic Enforcement, Department of Justice, State of California.

Q. And Mr. Armenta, were you so employed on the 21st day of December, 1961?

A. Yes, sir, I was.

Q. I'm going to ask you, sir, if on that day you have occasion to remember the events of that day.

A. Yes, sir, I do.

Q. Will you tell us, if you had occasion to meet a [fol. 7] Frank Green on that day?

A. Yes, I did.

Q. Will you describe that person for his Honor, the Court?

A He's a Negro male adult, approximately 35 years old, five feet, eleven inches, about 165 pounds.

Q And Mr. Armenta, will you tell his Honor, the Court, did you have occasion to see Mr. Frank Green on the 21st of December, 1961?

A Yes, I did.

Q And what was your occasion for seeing him?

A We placed him under arrest in his hotel room.

Q And where was that, sir?

A That's on Second and Macdonald Streets in Richmond.

Q And will you tell us the occasion that you had to place him under arrest? Did you have a warrant, or not?

A At the time I don't recall if we had a warrant or not.

Q Mr. Frank Green was, in any event, placed under arrest in your presence, was he, sir?

A Yes, sir, he was.

Q Who was with you at that time?

A Agent Groom and Richmond police officer Stumpf.

Q And will you tell us what you observed physically about Mr. Green at that time, if anything, that was unusual? How was he dressed, sir?

A I recall he had a pair of dark colored trousers on. This was after we left the room.

[fol. 8] Q The first time you met him, sir.

A At the first time I met him I believe all he had on was a pair of what you call skivvy drawers.

Q And then did you have occasion to see him dressed, sir?

A Yes, sir, I did.

Q Was anything done in regards to his dress?

A Yes, sir. A close check was made of all the clothing that Mr. Green put on, and also all the clothing in the room.

Q And who did that, sir?

A Officer Groom—Agent Groom, Officer Stumpf, and myself.

Q And for the record, who is Agent Groom?

A He's an agent for the Bureau of Narcotic Enforcement.



Q And after you observed this with Mr. Frank Green, tell us what occurred next.

A We took Mr. Green to the Richmond Police Department.

Q And will you tell us what was done at the Richmond Police Department with Mr. Frank Green?

A He was interrogated.

Q Now, did you see something further occur at the Richmond Police Department regarding the search of the person of Mr. Green?

A Yes, sir. He was searched again at the police department.

Q And approximately what time of the day was this on the 21st of December, 1961?

A That he was searched the second time?

Q Yes.

[fol. 9] A That was about 12:30, or just shortly before.

Q Would this be around the noon hour, sir?

A Just at the noon hour.

Q And this was at the Hall of Justice in the City of Richmond, was it, sir?

A This is in the police department.

Q Police department in the City of Richmond.

A Yes, sir.

Q County of Contra Costa. Would you— Without relating any conversations, did you hear a conversation with Mr. Green regarding a Mr. Joe Cooper?

A Yes, sir, I did.

Q And was there a conversation with Mr. Green regarding Mr. Joe Cooper and narcotics?

A Yes, sir, there was.

Q Now, after Mr. Green was searched the second time, tell his Honor what happened.

A He was furnished with \$20.00, State funds, by Agent Groom, and he was transported to the downtown area in Richmond.

Q And will you tell us the occasion that you had to go do the downtown area in Richmond, sir.

A We went to the downtown area to a point between Eleventh and Twelfth Streets on Nevin, and made a phone call from a phone booth in a parking lot.

Q And how did you get to the downtown area, sir, that day?

A We were driven— Green and I were driven by [fol. 10] Agent Lee of the Federal Bureau of Narcotics.

Q And there were three of you in a car, were there, sir?

A Yes, sir.

Q And whose automobile was that?

A That was Agent Lee's automobile.

Q And that's a gentleman who is a member of the Federal Narcotics Bureau?

A Yes, sir.

Q And will you tell his Honor where you went down town in the City of Richmond?

A We went down Macdonald Street and turned right on Eleventh Street and made another right turn and parked in front of the parking lot.

Q And where was this telephone that you mentioned, sir?

A That was just off the sidewalk in the parking area, off of Nevin.

Q And was this a public phone, sir?

A Yes, sir, it was.

Q Then tell us what happened in this area?

A We had got the signal that—

Q Well, without repeating any hearsay, sir, did you receive a signal?

A Yes, sir, I did.

Q From who, sir? A From Agent Groom.

Q And then will you tell us what you did next?

A Mr. Green and I entered the phone booth together, [fol. 11] and I placed a twin phone, a hearing apparatus, on the receiving end of the phone, and I furnished Mr. Green with a dime, which he inserted in the phone booth, and then dialed a number.

MR. CURTIN: At this time, Your Honor, may the record show I am showing to Mr. Moran, counsel for the defendant, a photograph, before showing it to the witness, Your Honor.

THE COURT: It may so show.

MR. CURTIN: (Handing)

MR. MORAN: (Examining)

THE COURT: Where was Mr. Green's hotel room where you arrested him?

THE WITNESS: It was on Second and Macdonald Streets.

THE COURT: Second and Macdonald.

THE WITNESS: Yes, sir.

Q (By Mr. Curtin) This photograph, Mr. Armenta, that has been just shown to defense counsel, can you identify that photograph for his Honor, the Court?

A Yes, sir, I can.

Q What does that photograph depict, sir?

A The phone booth from which Mr. Green and I made the phone call.

Q And is that picture a fair representation of the area and the scene about which you just told us you made a phone call with Mr. Green?

A Yes, sir, it is.

[fol. 12] MR. CURTIN: At this time, Your Honor, may we ask that this be introduced in evidence as People's Number 1.

THE COURT: It will be received in evidence and marked People's Exhibit Number 1 in evidence.

(Whereupon the photograph above referred to was received in evidence and marked People's Exhibit No. 1.)

Q (By Mr. Curtin) Now Mr. Armenta, you stated that a number was dialed.

A Yes, sir.

Q Did you see that number being dialed?

A Yes, sir, I did.

Q Who dialed the number? A Mr. Green.

Q And what number did he dial, sir?

A It was BE 21879.

Q And then will you tell us— You say you had attached another receiver to the phone, sir?

A Yes, sir, I had.

Q And could you hear the conversation that was then had on the phone?

A Yes, sir, I could.

Q Will you then tell us if you recognized any voice with whom Mr. Green had a conversation?

A Yes, sir, I did.

Q And did you have occasion to have heard that voice before that time on the 21st of December, 1961?

A Yes, sir, I had.

[fol. 13] Q Did you hear that voice since that time on the 21st of December, 1961?

A Yes, sir, I have.

Q And whose voice was that, sir? A Mr. Cooper's voice.

Q And Mr. Cooper, is that the defendant in this matter?

A Yes, sir, it is.

Q And are you familiar and know Mr. Cooper when you see him?

A Yes, sir, I do.

Q Do you see him present here in court?

A Yes, sir, I do.

Q Will you point him out to his Honor?

A It's the gentlemen seated on the end of the table.

MR CURTIN: May the record show that the witness has identified—

THE COURT: Yes, it may so show.

Q (By Mr. Curtin) Will you tell us, then, what the conversation was between Mr. Green and Mr. Cooper?

A As I recall it, a woman answered the phone, and Mr. Green asked for Joe, and she called—she said, "Just a minute," or something like that. She called Joe, and the next voice I heard was Mr. Cooper's voice. And Green said, "Joe?" And Mr. Cooper said "Yeah." And Green said, "How are things?" And Joe said, "All right, I guess." And then Mr. Green said, "How about a deuce?" And Joe said, "Yes." And there was a kind of a pause, and then Green said, "Well, what do you want me to do?" And Green said—Mr. Cooper said, "Well, [fol. 14] let's see." And then Mr. Green said, "Well, how about Newall's?" And Joe said, "Well, that's as good a place as any." And Green said, "When, right now?" And Joe Cooper said, "Yes, right away."



Q Now, sir, you've testified that you're a member of the State Bureau of Narcotics. Are you familiar with the terminology of the word deuce?

A Yes, sir, I am.

Q And have you heard that word used before, sir?

A Yes, sir, I have.

Q Is that used in the narcotic traffic and in the narcotic world, sir?

A Yes, sir, it is.

Q What is the meaning of the word deuce?

A Deuce is used in referring to bindles of heroin or capsules of heroin.

Q Now, after this conversation, was it concluded with what you have just told us, sir?

A Yes, sir, it was.

Q Tell us what you did next and what you saw Mr. Green do next?

A Well, Mr. Green and I left the phone booth and entered Mr. Lee's vehicle again. And we proceeded out to the vicinity of 23rd and Cutting Streets.

Q And what is at the location of 23rd and Cutting Streets, Mr. Armenta?

[fol. 15] A That is Newell's Market. It's a pretty large market.

Q And will you describe the area of the market at 23rd and Cutting, sir?

A The market is on the corner of 23rd and Cutting and on the West side of the same block there is a parking area which faces onto 22nd Street and Cutting.

MR. CURTIN: Your Honor, I'm showing another photograph to Mr. Moran, counsel for the defendant. (Handing)

MR. MORAN: (Examining)

Q (By Mr. Curtin) Mr. Armenta, I will show you this photograph and ask you if you can describe that photograph for his Honor, the Court, what it depicts. (Handing)

A (Examining) It depicts Newell's Market on 23rd and Cutting.

Q And can you tell us where that photograph would be taken from and the area to which direction it is pointed, sir.

A This photograph would be taken facing south.

Q And that would be toward the Newell's Market area, sir?

A This photograph would be taken facing south.

Q And that would be toward the Newell's Market area, sir?

A Toward the Newell's Market.

Q Does it also depict the parking area of Newell's Market?

A Yes, on the west side.

Q That location it depicts is in the City of Richmond, County of Contra Costa, State of California.

A Yes, sir, it is.

Q And it's a fair representation of what it depicts.  
[fol. 16] A Yes, sir, it is.

MR. CURTIN: At this time, Your Honor, we ask that it be marked as People's Number 2 in evidence.

THE COURT: It will be received in evidence and marked People's Exhibit Number 2 in evidence.

(Whereupon the photograph above referred to was received in evidence and marked People's Exhibit No. 2.)

Q (By Mr. Curtin) Now, sir, you told us that you had gone to that area with Mr. Green, is that correct?

A Yes, sir.

Q How did you get there?

A Agent Lee drove us in his vehicle.

Q And tell us what happened in that area, sir.

A We were approached on 23rd Street, and just prior to reaching Virginia and 23rd Streets, Agent Lee dropped Mr. Green off, and proceeded to the corner, just a few feet away where I left the vehicle.

Q Was Mr. Green in your sight at this time, sir?

A Yes, sir, just a short distance away.

MR. CURTIN: I show Mr. Moran another photograph, Your Honor. (Handling)

MR. MORAN: (Examining)

Q (By Mr. Curtin) This photograph that I have just shown to Mr. Moran, Mr. Armenta, can you describe what that photograph depicts, sir?

52  
A Yes, sir. It depicts 23rd Street facing—  
[fol. 17] Q And what—Go ahead, sir.

A —facing Cutting. Also Virginia Street. Virginia Street comes into 23rd.

Q And is Newell's Market also shown somewhere in that photograph, sir?

A Yes, sir, at the end of 23rd.

Q Does that photograph fairly depict the area about which you just described at 23rd and Virginia where Mr. Green got out of the car and then you got out of the car shortly after him.

A Yes, sir, it does.

MR. CURTIN: At this time, Your Honor, we ask this be introduced in evidence as People's Number 3.

THE COURT: It may be received in evidence and marked People's Exhibit Number 3 in evidence.

(Whereupon the photograph above referred to was received in evidence and marked People's Exhibit No. 3.)

Q (By Mr. Curtin) Now, tell us, then, what happened next, Mr. Armenta, after these events that you just told us.

A Mr. Green proceeded on the west side of 23rd toward Cutting. I crossed the street to the east side of 23rd and proceeded on the opposite side of the street, Green and I did, to Cutting. Mr. Green then crossed Cutting to the front of Newell's Market. And I crossed Cutting, also, and then crossed 23rd to the front of Newell's Market.

Q Was Mr. Green in your sight during this time [fol. 18] about which you have just told us.

A Yes, sir, he was.

Q Did Mr. Green, during this time that you have told us, contact any persons, sir?

A No, sir, he did not.

Q After this event about which have just told us, tell us what happened next?

A Mr. Green proceeded toward the west side of the market area toward the parking lot. At that time I proceeded toward the parking area, also.

Q And then tell us what happened next.

A A short while later I observed a blue Oldsmobile—I believe it was a '57—approaching 22nd Street and Cutting—on Cutting.

A And could you see who was in the car, sir?

A At the time it was approaching I couldn't see who was in the car. It made a right turn on 22nd off of Cutting, and at that time I observed the driver of the vehicle.

Q And you said, sir, the car was coming on Cutting. What direction on Cutting, sir?

A That would be—south, I believe.

Q Well, if I refresh your memory, sir, to tell you that Cutting runs west toward the San Rafael Bridge—

A Oh, it would be going east.

Q And then you saw the car turn on what street?

A Turn on 22nd Street off of Cutting.

[fol. 19] Q And you say that you were able to observe the person in the car at that time.

A Yes, sir.

Q Was there more than one person?

A No, sir, there was not.

Q And who was the person that you saw in the car?

A That was Mr. Cooper.

Q And that's the defendant in this matter.

A Yes, sir.

Q Then tell us what you saw next after you observed Mr. Cooper in the '57 Oldsmobile.

A At that time I was pacing back and forth in front of the market, and I observed Mr. Cooper's vehicle turn to enter the parking area.

Q Will you describe that for his Honor? You say the vehicle had turned east off of Cutting onto South 22nd?

A It turned onto 22nd and then shortly after it turned it proceeded to turn left into the parking area.

Q And then tell us what you observed next, Mr. Armenta?

A That's all I observed at that particular moment.

Q Now, did you observe any other persons in the area that you knew beside Mr. Green and Mr. Cooper?

A Yes, sir, I did.



Q And who was that, sir?

A That was Agent Groom.

Q Where did you observe Mr. Groom?

[fol. 20] A Mr. Groom was in the service station on the corner of 23rd and Cutting, and he crossed the street, 23rd, opposite me, and proceeded to a vantage point where he could see the parking area.

Q Well, sir, just tell us what you saw Mr. Groom do. He was in your sight at this time, is that correct?

A Yes, sir, he was.

Q And you say he was in a service station. Will you tell his Honor what service station that was, sir?

A I believe it's a Standard station; I'm not sure.

Q And what corner would that be on, sir, at 23rd and Cutting?

A That would be on the east—northeast corner, I believe.

Q And then after you saw Mr. Groom move, as you did, sir, tell us what happened next that you observed?

A Oh, about—just a couple minutes later I observed Mr. Green exit from the parking area towards me.

Q Where were you, sir, when you observed Mr. Groom moving as he did.

A I was still in front of the Newell's Market.

Q And what is there in front of the Newell's Market, sir?

A Well, there's a bus stop and also a mailbox, I believe.

Q And tell us then what you saw next after you saw Mr. Green coming from the lot, sir?

A Mr. Green crossed Cutting on 23rd. I crossed 23rd and I proceeded back toward Virginia on the opposite side of the street.

[fol. 21] Q And then tell us what happened next?

A Mr. Green reached Virginia and proceeded west on Virginia, where he met Agent Lee.

Q And tell us what you observed there, sir.

A I reached the vehicle shortly after Mr. Green, and Mr. Green at that time handed Agent Lee a small package.

Q Did Mr. Green get—or if you observed it—get into the vehicle with Agent Lee of the Federal Bureau of Narcotics?

A Yes, sir, he did.

Q Will you tell us, then, what happened after Mr. Green returned to Mr. Lee's car and this event had occurred?

A We returned to the Richmond Police Department.

Q Did you have occasion to see any other persons at the Richmond Police Department after you returned there with Mr. Green and Mr. Lee?

A Yes, sir, I did.

Q Who was there, also?

A Agent Groom and Agent Yates of the Federal Bureau of Narcotics.

MR. CURTIN: That's all of this witness at this time, Your Honor.

THE COURT: Cross examination, Mr. Moran.

### CROSS EXAMINATION

BY MR. MORAN: Q How long have you been a member of the—is it the State Bureau of Narcotics?

A Yes, sir.

[fol. 22] Q How long have you been an agent in that organization?

A Just over a year.

Q And have you been working primarily in this area?

A In the San Francisco Bay area, you mean?

Q Yes. A Yes, sir, I have.

Q Did you receive certain education to prepare you for this position?

A (No response)

Q Were you trained? Did you go to an investigative school?

A No, I did not.

Q Did you have any educational preparation in college or high school for this job—specifically for this job?

A No, sir, I did not.

Q Your training, if you received any, then, was in the field working after you joined the bureau.

A In the field of narcotics?

Q Yes. A Yes, sir.

Q But there was no training program set up in the Bureau of Narcotics.

A No, there's not.

Q At what time was Mr. Green arrested at 2nd and Macdonald?

A It was early that morning. I'd say around 5:30 or 6:00.

Q And who made the arrest?

A I believe all three of us did.

Q I see. That would be you, Groom, and Stumpf.

A That's right.

[fol. 23] Q Was he alone in the room? A Yes, sir, he was.

Q Did you find any narcotics in his possession?

A I don't recall finding any, no.

Q You don't recall finding any? A No, sir.

Q Did you look for some? A Yes, sir.

Q But you're uncertain—Maybe I misunderstood you. Are you uncertain whether any was found, or not found?

A Well, I didn't find any myself, no.

Q Did you observe anybody else find any? A No, sir.

Q Was a search made for narcotics? A Yes, sir.

Q Did you have any notes made concerning that search?

A No, I don't.

Q Did you make any notes of any kind while you were there?

A No, I didn't.

Q Now, did you say that Green's clothing was searched before leaving the hotel?

A Yes, sir, it was.

Q By whom?

A The clothing that he put on, or the clothing in the room?

Q I don't know, whatever clothing you're talking about that was searched.

57  
A Well, all the clothing was searched by all three officers.

Q All three of them. A Yes, sir.

Q You mean you all examined or searched a different portion of his clothing?

A I don't know. We were examining all the clothing [fol. 24] that was in the room. It might have been examined two or three times.

Q It might have been. A Yes, sir.

Q Did you purposely arrange it so that each of you examined all of his clothes?

A Well, that's the general—

Q I don't want to know anything about a general rule, Mr. Armenta. You said it might have been searched two or three times. What was done?

A Everything in the room was searched.

Q Three times. A I don't know.

Q Well, how many times?

A I don't know. It was searched.

Q And how did you ascertain that all of it was searched three times?

A I didn't say it was searched three times.

Q Or that it was searched one time.

A Well, I went through the room very well myself.

Q You searched everything you saw. A Yes, sir.

Q Everything. A Everything.

Q And then what did Officer Stumpf search?

A I don't know. I was busy searching.

Q You didn't observe what he did.

A I knew he was searching. I didn't observe what he was searching.

Q And what did Agent Groom search?

[fol. 25] A He was searching, also.

Q So you searched everything, and then Agent Groom and Officer Stumpf went over at least part of your work.

A I don't know, sir. They were searching at the same time I was searching.

Q Did you have a check-off list to cover the items you searched?

A No, I did not.



Q Did you take all of his clothes with you when you left the hotel?

A No, sir, we did not.

Q Who was present when Green was interrogated down at the Richmond Police Department?

A I was present, Agent Groom was present, and I believe Officer Stumpf was present. And there might have been other officers from the Richmond Police Department.

Q And over what period did that interrogation last?

A I believe it was—about 8:30 or 9:00 until noon or shortly before.

Q And where was Green during the period from 5:30 to 8:30, if you know.

A He was at the Richmond Police Department.

Q Was any interrogation going on during that period?

A I wasn't with Mr. Green all the time.

Q Do you know of any interrogation going on during that period.

[fol. 26] A No, I do not.

Q Now, did you make any notes during this period of this interrogation?

A No, I did not.

Q Was any tape recording or other recording made during that period of interrogation of Mr. Green?

A I don't know.

Q Did you observe any recording at all?

A No, I didn't.

Q Was a reporter present? A No, there wasn't.

Q Now, is it my understanding that despite all this searching that went on before that Green was searched again?

A Yes, sir.

Q By all three of you or four of you or how many?

A By Agent Groom.

Q Just by Agent Groom. A Yes, sir.

Q And that was around 12:30 p.m.

A Between 12:00 and 12:30, I believe it was.

Q Had Green been out on the street since that time?

A No, sir.

Q And what did the search consist of?

A Just clothing, personal effects.

Q Well, in what manner? How was the search made?

A Everything was taken out of his pockets. His pockets were looked into. The shirt pocket, pants cuffs, socks, and so forth.

[fol. 27] Q I don't want the so forth. If there was anything else that was done, will you tell us, please.

A Just what I said, sir.

Q And so forth. Were his socks removed? A No, sir.

Q Were his pants removed? A No, sir.

Q Was his shirt removed? A No, sir.

Q Shoes removed? A No, sir.

Q Was this your first acquaintance, shall we say, with Mr. Green?

A Yes, sir, it was.

Q Did you decide that morning to—you or Mr. Groom, to use him as an informant?

A Did we decide that morning?

Q To use him as an informant. Yes, that morning.

A Yes, sir.

Q What did you know if anything about his background at that time?

A I didn't know anything about his background.

Q Did you know if he had any prior arrests?

A No, I didn't.

Q Did you check to see if he had any prior arrests?

A I didn't myself, no.

Q Well, was it done at your direction or with your knowledge?

A No, sir, I didn't.

Q You don't know. A I didn't.

Q Was it done with your knowledge or under your direction.

[fol. 28] A No, sir.

Q It was not done. A No, sir.

Q So you didn't know at that time whether he had any previous convictions for narcotics or any other offenses.

A No, sir, I did not.

Q Was there anything you knew about him to indicate to you that he was honest and trustworthy?

A What was that?

Q Was there anything that you knew about this man Green to indicate to you that he was an honest and trustworthy informant?

A No, sir.

Q Was he under— You said he had been placed under arrest?

A Yes, sir.

Q And for what violation, if you know?

A For sale of narcotics, I believe.

Q For sale of narcotics. A Yes, sir.

Q And do you know when that sale was supposed to have occurred?

A No, sir.

Q You weren't handling his case, I take it.

A I was off and on on the case.

Q Who was in charge of it? A Agent Groom.

Q But you didn't know anything about the charge for which you arrested him any details of it.

A No, sir, I did not.

[fol. 29] Q Did you know to whom he had sold this narcotic?

A No, sir.

Q Now, prior to December 21st, at 12:30 p.m., had you ever previously seen the defendant Joe Cooper?

A Yes, sir, I had.

Q And where and when?

A I had seen him in the vicinity of 6th and Macdonald Streets.

Q And on what date?

A I don't recall the date.

Q What month?

A It was either December or November, '61.

Q And did you know who he was on that occasion?

A Yes, sir.

Q And how did you identify him?

A He was pointed out to me by Agent Groom and one of the Richmond Police officers.

Q And where was this?

A In the vicinity of 6th and Macdonald Streets.

Q Well, in a store, on the street, in a car—

A On the street in the car.

Q Night or day? A This was in the evening.

Q What time? A I don't recall.

Q And he was pointed out to you by Agent Groom?

A Yes, sir.

Q Can you—Did he identify him by name?

A Yes, sir.

[fol. 30] Q What was Mr. Cooper doing at that time, if anything?

A He was driving a vehicle.

Q Were you standing in the street or in a car?

A I was in another vehicle.

Q And he was driving past you at night.

A He was driving and he also was parked one time.

Q How far away from him were you at that time?

A Just across the street.

Q How far away from him? A Across the street.

Q Could you tell us how many feet?

A No, sir. Just across the street.

Q I see. You were directly opposite?

A Yes, sir.

Q On Macdonald. A Yes, sir.

Q And were there lights on in his car?

A You mean the inside light, sir?

Q Yes. A No, sir.

Q Was he wearing a hat?

A I don't believe he was, sir.

Q Now, you testified you had heard his voice before. Would you tell me the occasion for that, that is, you heard his voice prior to the time that he was allegedly reached on the telephone on the 21st of December.

A When did I hear his voice before?

Q Previously, yes.

A I heard it on a tape recording.

[fol. 31] Q And where was the tape recording heard?

A This was in the Federal Narcotics Bureau office in San Francisco.

Q And who produced the tape? A Agent Yates.

Q Agent Yates works in the State Bureau of Narcotics, is that it?

A Federal Bureau of Narcotics.



- Q Federal Bureau. A Yes, sir.
- Q He and Lee? A Yes, sir.
- Q And when was that heard?
- A I don't recall the exact date when that was heard.
- Q Well, recall the approximate date, then.
- A Oh, I believe it was around the first of December.
- Q Of 1961. A '61, yes, sir.
- Q And this—was this tape of a telephone conversation?
- A Yes, sir.
- Q And was that made by you? A No, sir.
- Q Do you know what number it was made on?
- A No, sir.
- Q How was Mr. Cooper identified in the tape?
- A (No response)
- Q How did you ascertain that that was the defendant's voice?
- A Oh, Agent Yates told me it was Mr. Cooper.
- Q Was there anything in the conversation to indicate that it was Mr. Cooper? Did he identify himself by name?
- A No, just by his voice.
- [fol. 32] Q Now, did Officer Yates tell you how he happened to acquire this taped conversation?
- A Yes, sir.
- Q And did he tell you on what phone line it had been—  
—from which phone line it had been extracted?
- A No, sir, he did not.
- Q He just told you it was a phone. A Yes, sir.
- Q Was it in Richmond? Was the phone in Richmond?
- A Which one?
- Q You said this was a transcribed recording of a phone conversation.
- A Yes, sir.
- Q Do you know whose phones were involved?
- A No, I do not.
- Q Is Agent Yates outside today?
- A Yes, sir, he is.
- Q Who else was present when you heard that recording?
- A I believe Agent Groom was present.
- Q The two of you? A Yes, sir.

Q Was Agent Yates there, also? A Yes, sir, he was.

Q And how long was this transcription that you listened to?

A Just about ten seconds, I believe, the part that I listened to.

Q You just listened to ten seconds of it.

A Just a short—short part of it, yes, sir.

Q And how many persons were speaking during that [fol. 33] ten-second part?

A Just Mr. Cooper and whoever made the call.

Q Well, who did make the call?

A I don't know. I don't know, sir.

Q Mr. Yates didn't identify the other person?

A No, sir.

Q After Agent Lee took you to the vicinity of 23rd and Cutting, as I understand it, Green got out and then you got out a moment later.

A Yes, sir.

Q As Green went into the parking lot, you were standing on the south side of Cutting, were you?

A No, I was still walking.

Q You were still walking where?

A Toward the parking area.

Q I see. How far were you behind Green?

A Oh, just—about from here to that rack—the coat rack. A little further, maybe.

Q How long did it take you to get from Lee's car to the position that you ultimately assumed in front of Newell's Market?

A Just a few minutes.

Q Well, one minute, two minutes, or what?

A A few minutes is all I can estimate.

Q You walked at a normal rate? A Yes, sir.

Q Now, after you arrived at the market, you mentioned that you were pacing back and forth in front of it. Would that be on the south side of Cutting?

A Yes, sir.

Q And you had a—in a position where you could see the parking lot.

A Yes, sir.

Q And you remained there until Mr. Green returned or left the parking lot.

A Yes, sir, I did.

Q How long was Green in the parking lot?

A I'd say about five minutes all together.

Q And you mentioned that you saw Mr. Cooper's car turn into that lot.

A Yes, sir, I did.

Q How long had you been in front of the market before you saw Cooper's car?

A About four minutes, I guess—three or four minutes.

Q And then after Cooper's car drove into the lot, how long was it before Green left the lot?

A Just a couple minutes, one or two.

Q Did Green ever leave that parking lot—I'll withdraw that.

After you saw Cooper's car turn right off of Cutting, you lost sight of both Cooper and Green, did you not?

A No, sir.

Q Who did you lose sight of, if anybody?

[fol. 35] A I lost sight of both of them, but not at that point.

Q Isn't it true that at the point after Mr. Cooper turned, that is, he made the right turn, that he went out of your vision for a couple of minutes?

A No, sir.

Q And isn't it true that in that two minutes, after the two minute period had elapsed, that Green walked from the parking area toward you at the corner—toward where you were at the corner?

A No, sir.

Q Have you read the Grand Jury transcript in this matter?

A Yes, sir.

Q I'll call your attention to page nine, lines 25 through 31, and ask you to read to yourself the question and answer there. (Handing)

A (Examining). Yes, sir.

Q And do you recall giving the testimony before the Grand Jury in which you were asked, "QUESTION: Then would you tell us what happened next, Mr. Armenta?"

"ANSWER: At that point, after he turned, made the right turn, he went out of my vision for a couple of minutes, and at that time in that two minutes, after that two minute period had elapsed, Green walked from the parking area toward me again to the corner."

Now, do you recall being asked those questions and giving those answers?

[fol. 36] A Yes, sir, I do.

Q Now, what's this about the Standard Oil Station where Mr. Groom was standing? Is that correct? He was standing there while you were standing in front of Newell's?

A No, sir. His vehicle was in the gas station.

Q That's on the northeast corner of 23rd and Cutting.

A Yes, sir.

Q Did he remain there, or do you know?

A He didn't remain there, no, sir.

Q Well, where did he go?

A He left the vehicle and crossed 23rd Street opposite me.

Q Is that all? A Do you want some more?

Q I asked you where he went, Mr. Armenta.

A I said he crossed 23rd opposite me on—where I was standing.

Q How long did he stay there? A Pardon?

Q How long did he stay there?

A He stayed there until Mr. Green left the parking area.

Q Could you continue to see him and did you see him?

A I saw him as he crossed the street, and also while he was on the opposite side of the street.

Q That would be on the north side of the street.

A Yes, sir.

Q And what's over there on that side of the street opposite where you were?

A Well, on the corner there's a vacant lot. There's—  
[fol. 37] I believe there's a house after the vacant lot.

Q Well, is that where he was standing by the house?

A He was by the house, and also on a stairway of the house.

Q Directly across from the Newell Market.



A Well, directly across there's another gas station, but behind the gas station there's a lot.

Q I'm sorry.

A Directly across from the market is a gas station, and behind the gas station is a vacant lot. And that's the route he took.

Q Well, maybe you can answer this: After Mr. Groom got out of his car at the northeast corner of 23rd and Cutting, did you have him in sight in your view at all times?

A As near as I can recall, yes, sir, I did.

Q Now, we had a number of pictures here. Are there any pictures showing where Mr. Groom was standing?

A Not of the ones that I have seen.

Q Well, were there any others taken that you have seen at an earlier time that showed where he was standing?

A At different points, yes.

Q Well, I'm asking this point that you have described, across the street from Newell's.

A Well, he was at different points across the street from Newell's.

Q Tell me every point that he stopped at that you saw him.

A I don't recall how many points he stopped at.

[fol. 38] Q You mean you just saw him intermittently.

A No, sir.

Q You saw him all the time.

A I didn't count the times he stopped or paused. I wasn't concerned with the number of times he stopped and paused.

Q I see. But—

THE COURT: Do I understand he walked up and down over there?

THE WITNESS: No, sir. He'd walk and he would stop at different points.

THE COURT: Then move along—

THE WITNESS: He'd move along and stop again, pause for a second.

Q (By Mr. Moran) But you observed him wherever he may have been continuously during the time that Mr. Green was in the parking lot.

A No, sir, because I was trying to observe Mr. Green, also.

Q In other words, you'd look at one and then at the other.

A Well, just—Yes, sir.

Q All right. After Mr. Groom left the Standard Oil station, he crossed over to 23rd and Cutting on the north side of the street.

A Yes, sir.

Q Tell us where he went from there.

A He went through the vacant lot and then proceeded to a house and climbed a stairway of the house, I believe.

[fol. 39] Q Now, that house was somewhat opposite Newell's Market behind the service station?

A It was opposite the parking area.

Q Opposite the parking area. A Yes, sir.

Q Well then, what street would it be?

A The house would be facing 22nd.

Q Then that would be—that would be south of cutting:

A That's still north—still north of Cutting.

Q Be on 22nd north of Cutting.

A It would be east of 22nd.

MR. MORAN: Do you have any pictures of that, Mr. Curtin, that would demonstrate it, perhaps?

MR. CURTIN: Yes, Mr. Moran.

May the record show, Your Honor, that I am showing two photographs that might aid defense counsel. (Handing)

MR. MORAN: (Examining)

Q (By Mr. Moran) I'll show you a photograph which appears to be in the general area described. Would you tell me if—where Mr. Groom was stationed in that area, if it shows.

A (Examining photograph)

Q Well, first let me ask you this: Does this appear to be a view taken looking south toward the parking lot—

A Yes, sir.

Q —of the Newell Market? A Yes, sir.

Q And it appears to be taken directly opposite the parking lot.

[fol. 40] A Yes, sir.

Q All right. Now, in that area, do you recall that Mr. Groom stationed himself for a period—

A I believe he was somewhere over here.

Q It would be over to the right.

A Right—to the right. Just a little bit back here.

THE COURT: Well, the record doesn't show which way is right.

MR. CURTIN: Pardon me, Counsel, and Your Honor. This photograph may further—I think it's a better photograph. (Handing)

MR. MORAN: (Examining) (Handing to witness)

A This is the vacant lot I was speaking of. He crossed here and went to a point on this house here.

MR. CURTIN: Your Honor, may we have that marked for identification that he was just pointing to, for the record.

THE COURT: Are you going to offer that, Mr. Moran?

MR. MORAN: As soon as I can figure them out. And I haven't done that yet. I will then offer the one that he's just—

THE COURT: Well, if you're going to offer it we'll have it marked Defendant's Number 1 for identification. Or are you offering it in evidence at this time.

MR. MORAN: I'll offer it in evidence.

THE COURT: All right. It will be received in evidence [fol. 41] and marked Defendant's Number 1.

(Whereupon the photograph above referred to was received in evidence and marked Defendant's Exhibit No. 1.)

THE COURT: Is that 22nd Street to the right on that photograph?

THE WITNESS: This street that you see there, Your Honor, is 23rd.

THE COURT: Yes. But this street here, would this be 22nd? Oh, this is 23rd Street here. I see.

THE WITNESS: This street here.

THE COURT: In other words, this is looking west across—

THE WITNESS: Yes, sir.

THE COURT: No, I'll take it back. Its—

THE WITNESS: It's looking west across 23rd Street.

THE COURT: Thank you.

MR. MORAN: 23rd or 22nd?

THE WITNESS: 23rd.

MR. MORAN: Now, I'll ask that this other photograph go in.

THE COURT: This one would be looking south across Cutting, showing 22nd Street to the right.

THE WITNESS: That would be looking south, yes, sir.

THE COURT: Across Cutting Boulevard.

THE WITNESS: Across Cutting, yes, sir.

THE COURT: It will be marked Defendant's Number 2.

[fol. 42] Do you want to start marking these?

(Whereupon the photograph above referred to was received in evidence and marked Defendant's Exhibit No. 2.)

Q\* (By Mr. Moran) How far were you from the parking lot from the point where you were standing while Green was in the parking lot.

A I wasn't standing. I was pacing. I was at different points from the parking area.

Q All right, give me the distances, then, of the different points.

A Well, different distances at different points. I'd walk to the—

Q Give them all to me, if—

A I don't—

THE COURT: That would be the limits? Did you go clear down to the corner of 23rd?

THE WITNESS: No, sir, I did not.

THE COURT: Well, give us the limits.

I think that's what you want, how far away and how close to the parking lot.



A Well, I paced almost to the edge of the parking area and—

Q (By Mr. Moran) And then you'd walk east a ways?

A Then I'd walk east a ways.

Q And how far east did you walk while you were pacing?

A Oh, let's see—about from here to the seats for the spectators.

[fol. 43] Q That would be about thirty or forty feet?

A About twenty-five feet.

Q And you continued to pace back and forth, did you?

A Yes, sir. I'd stop at different intervals.

Q Now, how far was—You mentioned that Mr. Groom was across the street at some opposite point in the vacant lot. How far was that from the parking lot?

A I'd say about forty yards.

Q Forty yards. A An estimate.

Q Actually, Mr. Groom was in a vacant lot behind a fence, was he not?

A There is a fence by the vacant lot, yes, sir.

Q What?

A There is a fence by the vacant lot.

Q Well, he was behind it, was he not?

A Not at all times.

Q And at what time was he not behind it?

A When he wasn't behind it he wasn't behind it.

Q Where was he then?

A He was past the fence.

Q The vantage point where he stayed most of the time while Green was in the parking lot, was on the vacant lot behind the fence, isn't that true?

A No, sir.

Q I'll ask you to look again at your Grand Jury testimony page nine, commencing at line three, going down [fol. 44] through line fifteen. (Handing)

A (Examining)

Q Do you recall, Mr. Armenta, testifying before the Grand Jury and giving these answers in response to these questions:—

A Yes, sir, I do.

Q "QUESTION: Now, were there other agents, if you know, of the State Narcotics Bureau present in this area?

"ANSWER: Yes, sir. Agent Groom was also present.

"QUESTION: Will you tell us where you observed Agent Groom?

"ANSWER: Agent Groom was on the corner of 23rd and Cutting in a vehicle, which he left about the time that we arrived near the parking area. When Green and I arrived near the parking area, then Agent Groom left the vehicle and proceeded—" That would be west. "— opposite me. It wasn't on the street; it was a vacant lot behind a fence to a vantage point where he could observe the parking area."

"QUESTION: To your knowledge did he also see you and did you see him?

"ANSWER: Yes, sir."

You recall those.

A Yes, sir.

Q Would you point out the vacant lot behind the fence, if it appears, in either Defendant's Exhibit Number 1 or [fol. 45] 2. (Handing photographs)

Now you're pointing to a fence—

A Right there. (Indicating)

Q All right.

THE COURT: That's not very helpful. I don't see what he's pointing to.

THE WITNESS: This is the vacant lot I was referring to down there.

THE COURT: Oh, I see.

Q (By Mr. Moran) And it was behind the fence?

A This is the fence here running east and west.

THE COURT: That's on the back of the service station.

THE WITNESS: Yes, sir.

Q (By Mr. Moran) All right. So his vantage point, then, was in this lot behind this fence, is that correct?

A No, sir. He moved to a different point after that.

Q I see. Now, you didn't mention that to the Grand Jury, I take it.

A I wasn't asked that, sir.

Q And you didn't mention it to them.

A I said to a vantage point.

Q I see. All right. Then when Green left the parking lot, you followed him, I take it, back to the point where Agent Lee's car was parked.

A Yes, sir.

Q And that would be near 22nd and Virginia.

[fol. 46] A That's between 23rd and 22nd of Virginia.

Q I see. On Virginia. A On Virginia, yes, sir.

Q And did Agent Groom accompany you back to that point?

A No, sir, he did not.

Q Where did he go?

A I didn't see where Agent Groom went. I was busy watching Mr. Green.

Q Now, could you tell me how long it took from the time you and Green got out of Agent Lee's car at 23rd and Virginia, went to the parking lot as you've described, and then returned to Agent Lee's car.

A The total time elapsed?

Q Yes.

A I'd estimate it to be about twenty minutes.

Q All right. A Twenty-five minutes.

Q Now, of the total of that time, how much of that period was Green out of your vision.

A I'd say around two to three minutes.

Q And of that time—I'll withdraw that.

MR. MORAN: That's all.

THE COURT: Any redirect?

### REDIRECT EXAMINATION

BY MR. CURTIN: Q Mr. Armenta, you told us, I believe, that you heard Mr. Cooper's voice after the 21st of December, 1961. When was it that you heard his voice, or did you have a conversation with him after that date?

[fol. 47] A I was present when Mr. Cooper was interrogated at the Richmond Police Department.

Q And what date was that, Mr. Armenta?

A That was on the 22nd, I believe, of December.

Q Is that the day following these events?

A The day following these events.

Q And was that the same voice that Mr. Cooper had then that you heard on the telephone on the previous day on the 21st of December, 1961?

A Yes, sir, it was.

Q Now, you've told his Honor that there was a period when Mr. Cooper and Mr. Green were not in your vision. Will you explain when that was, when that occurred, sir.

A Well, after Mr. Cooper made the right turn on 22nd Street, he started to turn left into the parking area. At that time I paced back toward 23rd Street and lost sight of both of them for a couple of minutes.

Q The phone number, Mr. Armenta, that you saw dialed and that you heard the conversation, had you made an investigation regarding that phone number?

A Yes, sir.

Q Did you determine to whom that phone number belonged?

A It belonged to—a residence on South 20th Street.

Q Had you determined if that was Mr. Cooper's phone number?

A Yes, sir.

Q Had you had knowledge where Mr. Cooper had [fol. 48] lived prior to the 21st of December, 19—

A Yes, sir.

MR. CURTIN: That's all of this witness, Your Honor.

## RECROSS EXAMINATION

BY MR. MORAN: Q What inquiry did you make to determine who is the subscriber to Beacon 2-1879?

A I didn't make the inquiry myself.

Q Is there any of your other testimony here this afternoon information that was given to you by somebody else?

A No, sir.

Q So you don't know of your own knowledge that this was Mr. Cooper's phone number.

A No, sir, I don't.

Q You didn't make any inquiry on your own to determine that it was his number.

A I did not myself, no, sir.



Q Did somebody in your organization tell you that they had made an inquiry to determine that?

A Yes, sir.

Q Who? A Agent Groom.

Q He said he had checked— A Yes, sir.

Q —and he found that that was Joe Cooper's phone number.

A Yes, sir.

Q Did he say it in those words? A Yes, sir.

Q Did he tell you how he had checked?

A Well, the phone company, I guess.

[fol. 49] Q Well, is that what he told you?

A It's the usual way.

Q Is that what he told you?

A I don't recall exactly what he told me.

Q Now, this blue Oldsmobile. Did you determine who owned that car? I believe you have testified that you saw Cooper's car.

A I believe it was registered to a female.

Q So when you referred to it as Cooper's car, what you meant by that is a car that he was driving.

A That he had been seen driving previously, numerous times.

Q Well, you didn't mean by your earlier testimony that that is his car, registered to him.

A No, sir.

Q You determined, one way or another, that it's registered to somebody else.

A I didn't say that.

Q Do you know to whom—Do you know who owns this car that you're talking about?

A I don't know who owns the car, no, sir.

Q Did you make any note of the license number of this car that you said you saw come down Cutting, turn right toward the parking lot?

A No, sir, I did not.

Q You never actually saw it turn into the parking lot at any time, did you?

[fol. 50] A I didn't see it enter the lot, no, sir.

Q And you didn't see it leave the lot, did you?

A I didn't see it leave the lot, no, sir.

Q And you didn't see it while it was in the lot, did you.

A No, sir.

MR. MORAN: That's all.

MR. CURTIN: Nothing further of this witness.

THE COURT: The witness may be excused?

MR. CURTIN: Yes, sir.

THE COURT: It's almost 3:00 o'clock. Would you prefer to take the recess now rather than interrupt the witness?

MR. CURTIN: Yes, Your Honor. We'll call as our next witness Agent Groom.

THE COURT: We'll take the recess first rather than interrupt the witness.

(Recess taken)

(After recess)

THE COURT: Let the record show that the defendant is present in court with his counsel.

You may call your next witness.

MR. CURTIN: Agent Groom, Your Honor.

HOWARD W. GROOM,

called as a witness on behalf of the People, having been first duly sworn, was examined and testified as follows:

[fol. 51] THE CLERK: What is your full name, please?

THE WITNESS: Howard W. Groom, G-r-o-o-m.

THE COURT: Take the witness chair, Mr. Groom.

### DIRECT EXAMINATION

BY MR. CURTIN: Q Mr. Groom, what is your address, for the record, please?

A 22 Copper Avenue, Berkeley, California.

Q And what is your business or occupation, sir?

A I'm an agent for the Bureau of Narcotic Enforcement, State of California.

Q And approximately how long have you been so employed?

A Approximately three and a half years.

Q Mr. Groom, then you were so employed on December the 21st, 1961.

A Yes, sir.

Q On that day, Mr. Groom, do you recall the events of that day?

A Yes, sir.

Q Will you tell us, Mr. Groom, if you had occasion to meet Frank Green, a person by the name of Frank Green on that date.

A Yes, sir, I did.

Q And will you describe that person for his Honor, the Court?

A Frank Green is a colored male adult in his late twenties or early thirties, approximately five feet eleven or six feet, slender build, a hundred and sixty, sixty-five [fol. 52] pounds.

Q And what was the occasion, if you did have an occasion, sir, to meet him on that date.

A I went to his hotel room that morning with Agent Armenta and Officer Stumpf for the purpose of arresting him for a narcotic violation.

Q And did you or did you not, sir, have a warrant for his arrest?

A I had a warrant for his arrest.

Q And did you have occasion to place him under arrest, Mr. Groom?

A Yes, sir. I served the warrant on him at his room.

Q Will you tell us what occurred there, Mr. Groom.

A I knocked on the door; he asked who was there. I told him Groom. He answered the door and I told him he was under arrest and showed him the warrant.

Q And where was this, sir?

A It was the Shamrock Hotel, 2nd and Macdonald Avenue. And I believe the room number is eighteen.

Q And is that location, sir, in the City of Richmond, County of Contra Costa?

A Yes, it is.

Q How was Mr. Green dressed when you served the warrant upon him?

A He had a pair of shorts on. And that is all.

Q Will you tell us then what occurred next after serving [fol. 53] the warrant upon him?

A We searched his room, his person, and his clothing.

Q Then what did you and Mr. Green do next?

A I had him get dressed. I searched each article of clothing as he put it on. He would choose an article of clothing, what he was going to wear, I would search it and he would put it on.

Q And—

A We then went to the Richmond Police Department.

Q And Mr. Groom, then tell us what occurred at the Richmond Police Department.

A We talked to Mr. Green briefly, and then we put him in an interrogation room and went back out in the street for an hour or so. Then we returned, took him upstairs to the vice office where we talked to him further.

Q Was there any person in the interrogation room with Mr. Green?

A When we went out in the street?

Q Yes, sir. A No, sir, he was in there by himself.

Q And then when you returned did you get him in the interrogation room?

A We took him from the interrogation room, took him upstairs, yes, sir.

Q And was he by himself when you took him from that location upstairs?

[fol. 54] A Yes, sir.

Q Then will you tell us—tell his Honor where you took Mr. Green upstairs?

A It's on the third floor of the Hall of Justice, Richmond Police Department, where they have a large office that the vice group occupy.

Q And Mr. Groom, did you have a conversation there with Mr. Green?

A Yes, sir.

Q And did you have a conversation with him regarding Mr. Joe Cooper?

A Yes, sir.

Q Did you yourself know or have seen Mr. Joe Cooper prior to this occasion on the 21st of December, 1961?



A Yes, sir. I knew him and had seen him.

Q Mr. Groom, do you see Mr. Joe Cooper present here in the courtroom?

A Yes, sir, I do.

Q Would you point him out to his Honor?

A He is the gentleman on the extreme—my extreme right at the table.

MR. CURTIN: May the record show that the witness has identified the defendant.

THE COURT: Yes.

Q (By Mr. Curtin) Mr. Groom, then did you have a conversation with Mr. Green regarding narcotics? [fol. 55] A Yes, sir, I did.

Q Then tell us what occurred next after this conversation with Mr. Green.

A He was again searched, supplied with \$20.00 in marked funds and went out to make a phone call with Agent Armenta and Agent Lee, followed by myself and Lieutenant Sullivan.

Q And will you tell us how you followed them, sir.

A They drove in Agent Lee's car, Lee driving, Armenta and Green as passengers, myself and Lieutenant Sullivan followed in my State vehicle.

Q And where did you observe Mr. Armenta, Mr. Lee, and Mr. Green go, sir?

A They drove directly to a parking lot on Nevin, between Eleventh and Twelfth, where they parked and went in and made a phone call in the phone booth on the property of the parking lot.

Q And People's Number 1 in evidence, sir, is that the area that you observed them go to? (Handing photograph)

A That is the parking lot and the phone booth on the parking lot where the call was made from.

Q And tell us what you observed there, Mr. Groom.

A Agent Armenta, Mr. Green, got out of the car, and I informed them to go ahead and make the call—

Q Now, prior to that, sir, had something occurred?

A I had received a radio transmission from Agent Yates of the State—correction, the Federal Narcotic Bureau, [fol. 56] reau, who informed me that the—

MR. MORAN: We'll move—

MR. CURTIN: I'm sorry, sir. Without repeating that.

Q (By Mr. Curtin) You had received a radio message.

A Yes.

Q And was that on a car radio, sir?

A It was on the State Highway Patrol radio which State cars are equipped with.

Q And did you recognize Agent Yates' voice in that message?

A Yes, sir.

Q Then after receiving that message, you had a conversation, or did you indicate in some way to Mr. Armenta a message.

A I told him to go ahead and make the call, that the car was in front of the house.

Q Then what did you see, Mr. Armenta and Mr. Green and Mr. Lee do? Those three persons.

A Mr. Green—Mr. Lee remained in his vehicle, and Mr. Green and Mr. Armenta got into the phone booth together. Armenta put a device on the phone and it appeared that they were making a phone call.

Q Now sir, after you observed Mr. Green and Mr. Armenta in the phone booth, then tell us what next occurred?

A They emerged from the phone booth and got back into Agent Lee's vehicle. We pulled alongside them, and they stated that the call had been made and they were to go to 23rd and Cutting, Newell's Market. Agent Lee [fol. 57] didn't know the best way to get there, so we told him to follow us and we drove and they followed us.

Q And you said Lieutenant Sullivan was in your vehicle?

A Yes, sir.

Q With you, sir. And then tell the route that you took to his Honor, the Court.

A We drove out Nevin to approximately—I don't know, 14th, 16th, 12th, somewhere in there, turned right to Macdonald, went down to Macdonald and turned right again. I believe it's the—Santa Fe Avenue, where Macdonald goes under the underpass we took the road to the right. We did not go under the underpass. Drove down

on that to 23rd and then down 23rd to the vicinity of Virginia and Cutting.

Q Tell his Honor, the Court, then, what you observed in the vicinity, if anything, of 23rd and Virginia Streets in the City of Richmond on the 21st of December, 1961.

A Prior to arriving there, we had motioned the other car to go ahead of us. We observed them stopping, and at that time we went on down the street and we pulled into the Standard station and could observe Mr. Green walking down on the west side of 23rd and then a little later we saw that Agent Armenta was coming down on the east side of 23rd following.

Q For the record, how much—

THE COURT: Just a minute.

You said "we." Who was in the car with you?

THE WITNESS: Myself and Lieutenant Sullivan.

[fol. 58] Q (By Mr. Curtin) And you stated that you saw Mr. Green walking down the west side and then you said after an interval of time you saw Mr. Armenta. Can you tell us what the time was, sir?

A Well, a matter of possibly half a minute or so.

Q And could you observe, if you could, Mr. Armenta and Mr. Green at the same time.

A Yes, sir.

Q Down the street. Then Mr. Groom, tell us what happened next?

A Well, they both crossed Cutting, then Armenta crossed 23rd, and followed Mr. Green as he walked into the area of the parking lot, just west of Newell's Market.

Q Now, sir, showing you People's Number 2, can you indicate or tell his Honor where it was that you were on that photograph when you observed Mr. Green and Mr. Armenta.

A Well, we were—This photograph is taken from the most northerly portion of the driveway of the Standard station at 23rd and Cutting, the Standard station being on the northeast corner. We were parked in approximately this location where we could look across. This is almost where we were parked, where the picture was taken from. Although the view would be wider.

THE COURT: That isn't in evidence, is it?

MR. CURTIN: Yes, it is, Your Honor, People's Number 2 in evidence, for the record.

[fol. 59] THE COURT: Oh, excuse me.

Q (By Mr. Curtin) Then showing you People's Number 3 in evidence, will you indicate on this photograph for his Honor where you saw Mr. Green and where you saw Mr. Armenta.

A Well, they parked just—

MR. CURTIN: Did you want to look—

MR. MORAN: May I stand behind here so I can follow.

A They parked on 23rd Street, which this photograph depicts—well, let me start—This photograph depicts 23rd Street heading south from just north of Virginia Street. And they parked in an area just north of Virginia on 23rd, and that's when we went by them. As I was driving down the street I didn't see exactly what happened behind me at that time.

Q (By Mr. Curtin) It was after you saw their car stop that you saw Mr. Green and Mr. Armenta, is that correct?

A Yes, sir.

Q And indicate where you saw those two persons on People's Number 3 in evidence.

A Is this—

Q Yes, the one you're holding.

A I first observed Mr. Green to the best of my recollection on the west side of 23rd Street approximately twenty-five to forty feet from the corner, walking south on 23rd.

Q And where did you see Mr. Armenta?

A I saw him a short time later coming down on the [fol. 60] opposite side of the street.

Q And then tell us what happened next, Mr. Groom?

A Well, Mr. Green went into the parking lot and Mr. Armenta was standing there where he could keep him in view—

MR. MORAN: I'll ask that that go out as the witness' conclusion as to what Mr. Armenta could—

THE COURT: Well, I suppose it doesn't mean he did. It means he was at a place where it was possible, I assume.



The motion will be denied.

Q (By Mr. Curtin) Go ahead, sir.

A I then crossed 23rd Street, went through the lot, went up on some stairs and stood on a porch of a house which fronts on 22nd Street where I had a clear view of the easterly two-thirds or one-half of the parking lot—Newell's parking lot.

MR. CURTIN: (Showing photograph to Mr. Moran)

Q (By Mr. Curtin) I'll show you this photograph, Defendant's Number 1, Mr. Groom; can you indicate on that photograph to his Honor where you were when you said that you did these things?

A I was on the—The large white house that shows in the center of the photograph shows a set of back stairs and a back porch or a platform, and I was standing on that porch or platform, looking out.

Q Now, sir, are you—

MR. CURTIN: Well, feel free to go up there, if you [fol. 61] want.

MR. MORAN: Thank you.

Q (By Mr. Curtin) Now, sir, did you have this photograph taken that you're holding in your hand as Defendant's Number 1?

A Yes, sir.

Q Are the conditions the same in that photograph as they were when you told his Honor about the events that you have just described?

A Not exactly, no, sir.

Q Will you tell his Honor what conditions have changed in that photograph, sir?

A At that time the house was—had just been completed construction and they had not yet put the fence around the back part and the south side of the white house.

Q And will you indicate on that photograph to his Honor what fence you're talking about that had not as yet been erected on December the 21st, 1961.

A The fence along the south and east of the—I believe it's a four-plex that shows in the center of the picture.

Q So then when you tell us that you went west across 23rd and through the vacant lot, you were able to go up

on the stairs of the house depicted in that photograph which is depicted there now with a fence around it.

A I was able to cross the lot and go directly up the stairs without anything interfering with me.

[fol. 62] Q And from that location, sir, were you able to observe Newell's parking lot;

A Yes, sir.

Q And showing you Defendant's Number 2, will you indicate for his Honor and for Mr. Moran where you were in relation to number one and number two as depicted in both those photographs.

A Well, this—Is this number two? This number two photograph was taken from a position just alongside of this back projection of the house just south of the fourplex I had previously indicated. That is a view from the ground level across Cutting at the entire parking lot of Jack Newell's Market.

Q All right, sir. And then will you tell us where you able to see Mr. Armenta from the location shown in Defendant's 1 and Defendant's 2?

A From Defendant's 1 I was considerably higher and I had a clear view of the entire front of Newell's Market, and as I say, probably the most easterly half of the parking lot. And I could see both Agent Armenta and Mr. Green at all times.

Q Now, sir, you stated that you had observed Mr. Green from the Standard Oil station on the northeast corner of 23rd and Cutting in the City of Richmond.

A Yes, sir.

Q And where did you see them from there, sir? Where was—

[fol. 63] A I saw him as he entered the parking lot. Both he and Mr. Armenta were in my view at the time that I left the service station and started across the street. I could see Mr. Green and Mr. Armenta, both. Mr. Green was in the parking lot area, and Mr. Armenta was on the sidewalk area.

Q And tell us, did you continue or were you able to continue and did you continue to see Mr. Green?

A Yes, sir.

Q Will you tell us what you observed and what you did as you observed these things.

A Mr. Green stood in the parking and then he moved back closer to the wall of the market, and stood there for approximately ten or twelve minutes. And then he suddenly started to walk out into the parking lot. And I could see that he was going to go out of my view. So I ran down the stairs and stood alongside of the house where I had a view of the entire parking lot.

Q And did you continue to have Mr. Green in your view?

A Yes, sir.

Q Then tell us what you observed next?

A I observed Mr. Green go up to the Oldsmobile, which I recognized as the car that Joe Cooper usually drove, and talk to a man in that car who appeared to me to be Joe Cooper.

Q And then what did you see Mr. Green—Let me withdraw that. Will you tell us where you first saw the [fol. 64] 1957 Oldsmobile that you just told us about.

A It was parked in the lot in the westerly half of the parking lot approximately the center of the lot. It was facing Cutting Boulevard.

Q Did you see the car prior to that, sir?

A No, sir.

Q Then tell us what you observed next?

A Mr. Green stood by the driver's side of the car for a minute, possibly a minute and a half and walked away toward 23rd and Cutting, the corner out of the parking lot. At that time I was unable to locate Agent Armenta visually so I proceeded to keep Mr. Green in view, as he crossed Cutting and came up 23rd Street back toward Virginia.

Q And what did you see there? Or what did you do next, Mr. Groom?

A I followed Mr. Green as he walked up the street, and as he turned onto Virginia between 23rd and 22nd I saw him come into Agent Lee's view, and then I crossed the street to where Lieutenant Sullivan had driven my car, reentered my car.

Q And what did you do next, sir?

A Then we drove next to the vehicle occupied by Agent Lee, Agent Lee held up something and said, "He scored two bindles."

Q Can you tell us what happened next?

A We made a U-turn, went down 23rd Street to [fol. 65] Portrero, went west on Portrero to 22nd, and were going down 22nd trying to see if the car was still in the lot, when we observed the Oldsmobile pull out onto 22nd, practically in front of us. Mr. Cooper looked right at me, made a right turn onto 22nd, another right turn on Cutting, drove down Cutting to 26th where he made a left turn, and parked on the nearest corner of 26th and Cutting. He motioned to a colored female adult who was between 26th and 25th, just having crossed 26th, I assume. She came back to the car to talk to him. We drove by again. He was again looking out the window at the woman. We drove down approximately a half or three-quarters of a block and parked and watched. Then when he proceeded up 26th Street we tried to locate him and lost him at that point.

Q Now, Mr. Groom, for the record, then you state that you saw Mr. Green approach this Oldsmobile and you said the person in there appeared to be Mr. Cooper. Was that the same person that you saw driving the car out of the lot at the time that you just indicated to us?

A Yes, sir.

Q And how many persons were there in that automobile?

A One.

Q And did you ever see more than one person in that car?

A Never.

Q From the time that you saw Mr. Green walking on 23rd Street near Cutting until the time that he reentered [fol. 66] the car with Agent Lee, who if anyone did you see Mr. Green contact other than Mr. Cooper whom you have just told us about?

A He contacted only Mr. Cooper.

Q Now, after you observed this, tell us what you did next, Mr. Groom?



A Well, when we couldn't locate Mr. Cooper, we went back to the police department where Agent Lee turned over to me two bindles of a white powder.

Q Sir, you said that when you couldn't locate Mr. Cooper. I believe you told his Honor that Mr. Cooper had parked the car at 26th and Cutting?

A Yes, sir.

Q And tell us what happened after you parked the car there.

A Well, we parked down a ways and watched him and then he pulled off. And by the time we got around and got back we had lost him from view and we couldn't find him.

Q So was it from then that you returned to—

A From then we returned to the police department.

Q And there you contacted Agent Lee, is that correct?

A Yes, sir.

Q Then what happened at the Richmond Police Department with Agent Lee, sir?

A Well, Agent Lee marked these two bindles and the piece of brown paper they were wrapped in, I marked them, and we opened them and made what we call a Markee field test. We got a color reaction, which indicated that the substance was possibly an opium derivative.

MR. CURTIN: Pardon me one minute, Your Honor.

(Mr. Curtin leaves courtroom and returns shortly thereafter.)

MR. CURTIN: Your Honor, may the record show, and defense counsel, that Mr. Reeves is handing me a brown Manila envelope in the presence of the Court.

THE COURT: The record may so show.

MR. CURTIN: At this time, Your Honor, I show it to Mr. Moran, counsel for the defendant. (Handing)

MR. MORAN: (Examining)

Q (By Mr. Curtin) For the record, Mr. Groom, you stated that you made a test of the objects handed to you by Agent Lee. I'm going to show you this brown Manila envelope and ask you to observe the contents of the envelope and tell us if you can identify them, sir. (Handing)

A (Examining) The two paper bindles are the ones that Agent Lee handed me the afternoon of the 21st.

A They have my initials on them.

Q And did Agent Lee hand you another object besides those two bindles, sir?

A A small piece of paper.

Q Did you subsequently, sir, make some sort of a container for those three objects?

A Yes, sir.

Q Will you tell us what that was?

[fol. 68] A I filled out this envelope and I handed it to Mr. Reeves just after I handed him these.

Q Did you keep the objects that you have identified, the two bindles and the brown piece of paper, in your possession until you handed them to Mr. Reeves?

A Yes, sir.

Q And when you handed them to Mr. Reeves, is that the time that you made out the envelope, the container for those three objects?

A No, sir. I made the envelope out a little later. I handed the two bindles to Mr. Reeves and I returned in an hour or so and made out the envelope to contain them in.

MR. CURTIN: At this time, Your Honor, may we have those marked for identification only, the envelope and the three objects that it contains.

THE COURT: They will be received and marked People's Exhibit Number 4 for identification only.

Q (By Mr. Curtin) Now Mr. Groom, after making the test as you told us on these bindles received from Agent Lee, what did you do after that, sir?

A We then proceeded out in the street in an attempt to locate Mr. Cooper or his vehicle.

Q And was that on the same day as the 21st of December?

A Same afternoon, yes, sir.

Q 1961. Tell us what happened after you attempted to locate Mr. Cooper and his vehicle.

[fol. 69] A Well, his vehicle was located at 7th and Macdonald, and we spotted on the car until Mr. Cooper returned to it.

Q Where were you, sir, at this time when you saw the vehicle and Mr. Cooper returning to the vehicle.

A I was in the hardware store immediately adjacent to his vehicle.

Q And what location was that, sir?

A The vehicle was parked on the south—correction—the northwest corner of 7th and Macdonald, and the hardware store is just west of there on the corner of 7th and Macdonald.

Q And again for the record, what kind of a vehicle did you see there, sir?

A It was the same Oldsmobile, '57, light blue Oldsmobile.

Q That you had observed earlier that day, sir?

A Yes, sir.

Q Then tell us what happened or what you did there.

A Well, as I say, we waited until Mr. Cooper returned to the vehicle. He returned to the vehicle and as he was putting his key in the passenger side, I approached him on his right, and Agent Lee approached him on his left, and he was at that time placed under arrest by—correction—Agent Yates approached him on his left, and he was at that time placed under arrest by Agent Yates of the Federal Bureau of Narcotics.

MR. CURTIN: Your Honor, at this time may the [fol. 70] record show I am showing another photograph to Mr. Moran. (Handing)

MR. MORAN: (Examining)

Q (By Mr. Curtin) I'll show you this photograph, sir, and ask you to identify that photograph or what it depicts for his Honor, the Court.

A This photograph depicting the northwest corner of 7th and Macdonald actually the portion of 7th Street just north of Macdonald.

Q And is that the area where you told his Honor that you saw the '57 blue Oldsmobile on the 21st of December, 1961?

A Yes, sir.

Q And there is a different car parked in that place in this photograph, is that correct?

A The Oldsmobile at that time was parked where the first car in this photograph shows.

Q But otherwise, are the conditions and the buildings and the area in that picture the same as they were at the time of the occurrences on the 21st of December, 1961.

A To the best of my knowledge they are.

MR. CURTIN: At this time, Your Honor, we would offer this in evidence as People's Number 5.

THE COURT: It will be received in evidence and marked People's Number 5 in evidence.

(Whereupon the photograph above referred to was received in evidence and marked People's Exhibit No. 5.)

[fol. 71] Q (By Mr. Curtin) Now, you stated that Mr. Yates approached Mr. Cooper at his left, and what did you do, sir?

A I approached him on his right.

Q And then what happened next, sir?

A We got to him at approximately the same time. Mr. Yates showed him a badge and said, "Joe, you're under arrest."

Q And then after these words were spoken, what happened next?

A Well, I took him by his right wrist and I assume that Agent Yates had him by his left wrist. And he motioned down and said, "It's there in the car over the sun-visor."

Q What side, or where are you in relation to the car, sir, parked there on 7th—

A We are standing at this point by the right side of the car, the right front seat of the car, just outside the car.

Q And is that on the driver's side or—

A On the passenger's side.

Q You're still on the sidewalk, sir. A Yes, sir.

Q And tell us what happened next after Mr. Cooper said, "There it is."

A Mr. Cooper said, "It's there under the sun visor." And someone, either Yates or I, asked him, "What?" And he said, "The marijuana cigarettes." I think he said then, "But I didn't put them there, someone else put them there." And at that point he took his left hand and put



it into his right shirt pocket and removed an object, a brown paper wrapped object and started to put it in his [fol. 72] mouth. He had his head down toward his chest. He was stooped over, because he was in the act of purportedly looking into the car. He reached his hand into his pocket and came up with this package. I released his right hand, grabbed his left hand to try and prevent him from putting this package in his mouth.

Q And when you grabbed his left hand, tell us what happened next, sir?

A I don't know exactly what happened. I know my finger went in his mouth and also the package.

Q Will you tell us—

A Then he proceeded to chew on my finger.

Q Well, how did your finger go into his mouth, sir?

A Well, he forced my finger in with the package and everything went in together.

Q And then tell us what happened next.

A Well, he chewed on my finger and I couldn't get it out; he wouldn't let go of my finger.

Q Tell us then what happened, sir?

A I finally pulled my finger out of his mouth. It felt like the first joint had been bitten off. I thought that was enough and I pulled the finger out. And in the meantime other officers had arrived.

Q Then what happened to the object that you say you saw Mr. Cooper put into his mouth?

A I never saw it again. I assumed he swallowed it. [fol. 73] Q And again for the record, would you describe that object, sir?

A It was a small package wrapped in what appeared to be brown paper.

Q And sir, did you, after getting your finger out of his mouth—tell us what you observed about your finger.

A My finger was severely lacerated, my right index finger.

Q Did you have occasion to have treatment or medical attention for your finger?

A Yes, sir, I did.

Q Where was that, sir?

A At the Permanente Hospital in Richmond.

Q And who treated your finger, sir?

A Doctor Flint. He's been in charge of the case. Doctor Qwan initially treated my finger.

Q And how long have you had treatment for your finger, sir?

A I am still going twice a week.

MR. CURTIN: At this time, Your Honor, may the record show I am showing to Mr. Moran two photographs. (Handing)

MR. MORAN: (Examining)

Q (By Mr. Curtin) I'll show you these two photographs, Mr. Groom, together. They've been seen by Mr. Moran, the defense counsel. Can you tell us what those photographs depict, sir?

A Those are pictures of my finger taken after it had been bitten.

[fol. 74] Q And are those pictures, sir, a fair representation of the condition of your finger after it had been bitten?

A Yes, sir.

Q Approximately how long after the occurrence on the 21st of December, 1961, were those pictures taken, sir?

A They were taken on the 29th of December.

MR. CURTIN: At this time, Your Honor, we'll offer both of these pictures in evidence.

THE COURT: They will be received in evidence and marked People's 6-A and B in evidence.

(Whereupon the photographs above referred to were received in evidence and marked People's Exhibit Nos. 6-A and 6-B, respectively.)

Q (By Mr. Curtin) Mr. Groom, after this occurrence, tell us what happened next?

A Well, after I got my finger out of Mr. Cooper's mouth, he was apparently still chewing something and I—the other officers were holding him and there was a big to-do. I attempted then again to get him to open his mouth and he started spitting blood and I realized whatever he had in his mouth—if he had anything in his mouth, it had gone. He was then handcuffed and taken into the Richmond Police Department.

Q For the record, was there any blood on your finger that you observed?

A Yes, sir. My finger was lacerated and bleeding.  
[fol. 75] Q Mr. Groom, then after this occurred at 7th and Macdonald, tell us what happened next?

A I walked over to the female who had been accompanying Mr. Cooper and also placed her under arrest. And then I was taken by Agent Lee and Stumpf to the Permanente Hospital.

Q Who was the female, sir, with Mr. Cooper?

A Edna Faye Carr.

THE COURT: I didn't hear that.

THE WITNESS: Edna Faye Carr, C-a-r-r.

Q (By Mr. Curtin) At the time, sir, of the placing her under arrest, was there anything unusual about her that you observed?

A At that moment?

Q Yes. A No, sir.

MR. MORAN: I'm sorry. I didn't get that.

THE COURT: He said, "No, sir."

MR. MORAN: What was the question?

MR. CURTIN: Was there anything unusual at that time that he observed about her.

MR. MORAN: I see. Thank you.

Q (By Mr. Curtin) Then, Mr. Groom, you said you went to receive medical attention for your finger?

A Yes, sir.

Q Now, after that occurrence, did you have occasion to see Mr. Cooper again?

A I saw him the following day.

[fol. 76] Q And where was that, sir?

A In the vice office of the Richmond Police Department, which I previously described.

Q And Mr. Groom, did you have a conversation with Mr. Cooper about the occurrences on the 21st day of December, 1961?

A Yes, sir, I did.

Q Was your conversation with him one that was freely and voluntarily entered into by Mr. Cooper?

A Yes, sir.

Q Was there any coercion, any promises of immunity made in that conversation?

A No, sir.

Q Were there any threats or any duress used in the conversation with Mr. Cooper?

A No, sir.

Q Who—

MR. CURTIN: I'll withdraw that, Your Honor.

Q (By Mr. Curtin) Will you tell us what was said by Mr. Cooper to you about the occurrences of the 21st of December, 1961.

MR. MORAN: If the Court please, before the witness answers that question, may I examine him briefly on the relevancy and on voir dire.

THE COURT: You mean on the voluntariness?

MR. MORAN: Yes. On that and on—the nature of his statement.

[fol. 77] MR. CURTIN: I have no objections to counsel doing that.

I was wondering if I could request of counsel and Your Honor the Court, to call a witness out of order, a Doctor Flint who is here at 4:00 o'clock. His testimony would be short.

THE COURT: Do you have any objection?

MR. MORAN: None at all.

MR. CURTIN: We could resume, if counsel has no objection.

THE COURT: All right.

THOMAS FLINT, JR.

called as a witness on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: What is your full name, please?

THE WITNESS: Thomas Flint, Jr., M.D.

THE COURT: Just take the witness chair, Doctor, please.

### DIRECT EXAMINATION

BY MR. CURTIN: Q Doctor, for the record, your address, please.

A The Kaiser Hospital at the corner of 14th and Cutting Boulevard in Richmond, California.



Q And Doctor, your business or occupation, sir?

A I am a physician and surgeon, specializing in surgery.

Q And Doctor, your training, experience and back-  
[fol. 78] ground for your present position.

MR. MORAN: We'll stipulate to the doctor's qualifications as a medical surgeon, if that helps any.

MR. CURTIN: Thank you. We'll accept the stipulation.

THE COURT: So stipulated.

Q (By Mr. Curtin) Doctor, did you have occasion to treat Howard Groom for an injury to his finger after December the 21st, 1961?

A I did.

Q And by the way, do you see that person present here in the courtroom?

A I see Mr. Groom.

Q Will you tell his Honor when it was, Doctor, that you first had occasion to treat Mr. Groom for a finger injury.

A I saw Mr. Groom for the first time on December 22nd, 1961 in the surgery clinic at the hospital for a redressing for an injury which he told me had been sustained the previous day.

Q And Doctor, have you had occasion to treat him for this injury since the 22nd of December, 1961?

A My function has been evaluating progress. Mr. Groom has, to my personal knowledge, been in the clinic on numerous occasions. I myself have seen him twice since the first visit. Three in all.

Q Doctor, have you, from your own personal knowledge, seen or—seen any indication of any disability or  
[fol. 79] permanent disability to Mr. Groom's finger?

A May I answer that in two parts, please.

Q Yes, sir.

A I have seen evidence of gradually decreasing temporary disability, and I have noted that progress has slowed up recently so that in my considered opinion there may be some permanent disability.

Q Doctor, I'll show you People's Number 6-A and 6-B, and ask you if this is the finger of Mr. Groom that you have treated, sir. (Handing photographs)

A (Examining) If this represents the right index finger, yes.

Q Doctor, you brought to court with you the medical records from Kaiser Hospital concerning the treatment of Mr. Groom's finger?

A Yes, I have them with me.

Q And all those records are kept in the ordinary course of business by the Kaiser Hospital at the time of the transaction.

A These records are kept by members of the Permanente Medical Group who practice medicine at the Kaiser Hospital.

Q And the entries on the business records for Mr. Howard Groom were made at the time of the occurrences, are they not, Doctor?

A The notes by the physician are made at the time. Other entries may be as required.

Q Could you indicate to the Court at the present time [fol. 80] the disability of Mr. Groom's finger for his Honor, the Court.

A At the time of my last examination of Mr. Groom, which was—a relatively short time—March 23rd, 1962—he demonstrated approximately forty per cent limitation of complete flexion, the ability to bend the two distal joints of his right major index finger.

Q In your opinion, then, Doctor, will there be a permanent limitation of action of the finger in any way?

A I anticipate—this is not a thing which I can state; I can merely give an opinion—I anticipate there will be a slight amount of permanent limitation of motion.

MR. CURTIN: That's all I have of this witness, Your Honor.

### CROSS EXAMINATION

BY MR. MORAN: Q You mean his finger will be a little stiff in one joint?

A Probably in the two outer joints—distal joints.

Q Two outer joints. And what will that limitation of motion, what is the extent of that, that you would expect as a permanent disability?

A Well, I would anticipate the inability to touch the fingertip normally to the palm. In other words, in percentage, probably between ten and fifteen per cent of loss of motion.

Q There was no fracture.

A There was no fracture either clinically or by x-ray.  
[fol. 81] Q How deep is the laceration?

A The lacerations were multiple and irregular and were relatively superficial.

Q Any stitches required?

A No stitches were taken.

Q And what generally has been the nature of the treatment?

A The original treatment consisted of the cutting away of the jagged edges of the superficial lacerations, determining the extent of the deeper damage due to the contusion from the pressure of the finger between two roundish sharp objects.

Q Well, he told you he had gotten bitten, didn't he?

A Yes. Between teeth.

Q Yes.

A And the evaluation of sensory changes—which there was total anesthesia present originally.

Q My question, however, was what generally was the treatment.

A Redressing of the wound at frequent intervals, at first about twice—two to three times a week, subsequently at longer intervals.

Q Has he been back there since March—what was it, March 29th?

A March 23rd.

Q Is he receiving any treatment now?

A No treatment with the exception of paraffin baths to increase the range of motion of the finger.

[fol. 82] Q How frequently are those given?

A May I check the record here?

THE COURT: Yes, you may.

A On March 23rd, 1962, I ordered paraffin baths and active and passive motion of the injured digits, injured finger, twice a week for a two months period. I have no personal knowledge that these treatments have been taken.

MR. MORAN: I believe that's all I have.

MR. CURTIN: Nothing further.

The witness may be excused?

THE COURT: The witness may be excused.

MR. CURTIN: We'll call Mr. Groom back to the stand.

THE COURT: Would you resume the stand.

HOWARD W. GROOM,

called as a witness on behalf of the People, having been previously duly sworn, resumed the stand and testified further as follows:

THE COURT: You are already under oath, Mr. Groom. Just be seated.

MR. CURTIN: I believe counsel had made a request—

MR. MORAN: Yes.

#### VOIR DIRE EXAMINATION

BY MR. MORAN: Q How any officers were present when this interrogation took place on December 22nd?

A When we interviewed Mr. Cooper there were myself, Sergeant Billingsley, Officer Stumpf, Agent Armenta, [fol. 83] Agent Lopez, and Lieutenant Sullivan.

Q Now, did you order or do you know if he had any medical treatment after his arrest?

A No, sir, I had nothing to do with his custodial care.

Q Was he a Federal prisoner?

A He was a State prisoner. But he was incarcerated in the Richmond jail.

Q You made no arrangements, made no request for medical care for him.

A No, sir.

Q He had complained to you, had he not, that his face and his lip was cut?

A Yes, sir.

Q That all his teeth were loose?

A He said that his teeth were loose, yes, sir.

Q I'm sorry.

A He did say that some of his teeth were loose.

Q But he told you all of them were loose, did he not, Mr. Groom?



A No, sir, I don't believe that he did.

Q And you observed scratches on his throat?

A No, sir.

Q He pointed those out to you, did he not?

A Not to the best of my recollection.

Q And swelling around his throat.

A Not to the best of my recollection, no, sir.

[fol. 84] Q You, I believe, used the phrase that there was a big to-do around the scene of his arrest. By big to-do, do you mean that this man was knocked down and kicked in the street?

A No, sir. We were trying to physically restrain him.

Q You were trying to physically restrain him.

A Yes, sir.

Q All right, I'll ask you again, was he knocked to the street?

A No, sir.

Q Did he fall to the street? A No, sir.

Q Was he kicked? A No, sir.

Q Was he struck? A No, sir.

Q Did any of the officers put their hands on his throat?

A No, sir.

Q Any of them grab him by the nose? A I did.

Q And lacerations resulted? A To his nose?

Q Yes. A It may be.

Q And nobody to your knowledge attempted to force this object out of his mouth, whatever it was, by either pushing or squeezing his throat.

A No, sir. I was in the position—

Q I'm sorry.

A I was right there by his mouth and throat and there was nobody else there except me.

Q I see. You were the only officer?

A No, sir. I was the only one in front of his face.

Q Did he have any—wearing any bandages the next day?

[fol. 85] A I don't recall any.

Q Still bleeding?

A Not that I could observe.

Q You had your finger bandaged by this time, didn't you?

A Yes, sir.

Q For the superficial lacerations that the doctor described.

A Yes, sir.

Q Now, I believe you told Mr. Curtin that there had not been any coercion or threats used on Mr. Cooper.

A In relation—

Q I'm thinking of this—just prior to the interrogation.

A You're talking about the interview?

Q Yes, sir.

A No, there had not been any. To my knowledge. I was there. He walked in the room and I talked to him.

Q Now, was there any coercion or threats used on any prior occasion that you know of?

A That was the only time I saw him after his arrest.

Q He asked you to see an attorney, did he not?

A Not me.

Q Not you. A (Shaking head)

Q Or nobody else in your presence.

A Not in my presence.

MR. MORAN: That's all.

THE COURT: You may proceed, Mr. Curtin.  
[fol. 86]

### CONTINUED DIRECT EXAMINATION

BY MR. CURTIN: Q Now, Mr. Groom, I believe my next question to you was, what was the conversation that you had then on the 22nd of December, 1961, at the Hall of Justice with Mr. Cooper.

A I asked him what it was that he had put into his mouth when he was placed under arrest.

Q What did he tell you, sir?

A He told me it was a marijuana cigarette.

Q And would you tell us what else was said at that time, sir?

A Well, I told him it didn't look like a marijuana cigarette to me. It was a lot shorter. And he said well

he had it folded in half. I asked him if he had it wrapped up—these are not exact—this is the best of my recollection of the context. He said it was wrapped in brown paper.

Q Was there any, sir, mechanical transcription or preservation of this conversation between you and Mr. Cooper made?

A Yes, sir.

Q And what was that, sir?

A A tape recording was made of the entire interview.

Q Was there any conversation with Mr. Cooper regarding what had happened to your finger, sir?

A Yes, sir.

Q What was that, sir?

A I said to him, "You would have been better off if you hadn't chewed my finger." And he said that he was [fol. 87] sorry, but he had heard about people getting choked and he thought that he might be getting choked. And then is when he made the complaints about his teeth being loosened and his nose being damaged. At that point I told him if he had let go of my finger I probably wouldn't have had to pull it out of his mouth.

Q Now sir, the automobile that you observed on the 21st of December, 1961, was a '57 Oldsmobile, you told us, is that correct, sir?

A Yes, sir.

Q And did you have occasion to see that car after that day?

A Yes, sir. I saw it again—I can't remember—two or three days later. Then I saw it again just recently.

Q And what was your occasion for seeing the car again recently, sir?

A I had some information which indicated that I should check the car again and more thoroughly.

Q Did you so check the car, sir? A Yes, sir.

Q And approximately when was this, Mr. Groom?

A I can't recall the exact date. It was last week, I believe, or possibly the tail end of the week before.

Q And what if anything did you find in checking the car again on this latter occasion?

A I found one marijuana seed.

Q And can you tell his Honor where you found that, sir?

A It was wedged beneath the carpeting actually on [fol. 88] the passenger's side of the car next to the seat.

Q And what did you do with that, sir, when you found it?

A I placed it in an envelope and I transported it to Richmond where I gave it to Criminologist Reeves.

MR. CURTIN: Pardon me one second, Your Honor.

(Mr. Curtin leaves courtroom and returns shortly thereafter.)

MR. CURTIN: Your Honor, may the record show that Mr. Reeves has handed me a second envelope in the presence of the Court and the presence of Mr. Moran. I'll show it to Mr. Moran at this time. (Handing)

THE COURT: Might I ask the relevancy of this, Mr. Curtin? It's outside of the issues. The only purpose I can see would be to show knowledge.

MR. CURTIN: That's the only purpose we had. Perhaps also, Your Honor, to show identity of the defendant the fact that he did state at the time of his arrest that there was marijuana in the car.

THE COURT: I see.

Q (By Mr. Curtin) I'll show you this envelope, Mr. Groom, and ask if you can identify that for his Honor, the Court. (Handing)

A (Examining) This is the envelope that I filled out and placed the marijuana seed in.

Q And will you examine the contents of that envelope, sir, and tell us if you can recognize the contents.

[fol. 89] A (Examining) This is a cellophane envelope containing a piece of paper that I placed in there indicating that this particular seed was found at 2:30 p.m. on April the 4th, 1962, in the vehicle, Memorial Temple Garage, San Francisco.

Q And Mr. Groom, you have had experience with the —with marijuana, sir?

A Yes, sir.

Q And you've handled and seen marijuana seeds in the past, have you?



A . Yes, sir.

Q Prior to this occasion.

MR. CURTIN: We ask that that be marked for identification at this time, Your Honor.

THE COURT: It will be received and marked People's Number 7 for identification.

(Whereupon the object above referred to was marked People's Exhibit No. 7 for Identification.)

MR. CURTIN: That's all of this witness at this time, Your Honor.

MR. MORAN: If the Court please, may I make a motion at this time that the conversation which this witness has testified to on December 22, 1961, concerning marijuana, and such part of his search of this automobile which relates to marijuana, go out. As I recall, the information charges the sale of heroin. There's never been any indication to me, either in the formal complaint or [fol. 90] informally, about a charge of possession or use of marijuana.

THE COURT: Well, I think it's admissible, as I see it, for only one purpose: At the time of his arrest he stated there was marijuana in the vehicle. On this occasion sometime later there is evidence of marijuana in it. Of course, some length of time has passed, but I suppose really that goes to the weight of it rather than admissibility. But it will be admitted for that sole purpose.

MR. CURTIN: May I also have the record show, Your Honor, that the defendant stated that what he had swallowed was also marijuana.

THE COURT: As I say, very frankly, I don't think it has any great weight.

MR. CURTIN: Yes, Your Honor.

THE COURT: I think legally it's admissible.

### CROSS EXAMINATION

BY MR. MORAN: Q Mr. Groom, this marijuana seed, I didn't see it but—it's quite small, I take it.

A Quite small, yes.

Q And that was found by you in April of this year.

A Yes, sir.

Q Now, the car has been in State custody for how long?

A Since December. Last year.

Q December of 1961. A Yes, sir.

Q Now, this is the second search you made, [fol. 91] A This is the first real search I made. The second time I checked the car. The first time I didn't actually search it thoroughly.

Q I see. So you have a thorough search and a sketchy search, is that correct?

A Yes, sir.

Q What were you looking for the first time?

A Heroin.

Q Now, when did you make that search?

A I made that sometime after his arrest within a matter of two or three days.

Q And where did you make it?

A It was made at the Beacon Tow Service yard, which is on Macdonald Avenue in the vicinity of 2nd or 3rd Street.

Q Where did you make your more recent search?

A Memorial Temple Garage in San Francisco.

Q How long has the car been over there?

A It's been over there since December of '61. Exactly when it was towed over I don't know.

Q Now, when you first searched it, you told the Court here that this defendant had mentioned something about marijuana having been in the car or a cigarette?

A Yes, sir.

Q But you weren't interested in marijuana then.

A No, sir.

Q And you are now? A No, sir.

[fol. 92] Q Did you ever find any heroin in the car, either in your sketchy search or in your thorough search?

A No, sir.

Q Did you ever find any evidence of heroin on Mr. Cooper's person or in his clothing, on any of your searches?

A I only had occasion one time to observe what I thought was heroin in his possession.

Q Well, maybe you don't understand my question. Did you ever find any.

A No, sir.

Q You looked? A Yes, sir.

Q Thorough search?

A I'll have to correct that. I did not search Mr. Cooper or his clothing.

Q I see. Were you present when a search was made?

A No, sir.

Q Who did search him? A I don't know.

Q Did you search his home or his residence?

A I searched his room at his home on South 20th Street, yes, sir.

Q That's actually the residence of an aunt, Mrs. Gulley?

A Mrs. Gulley, yes.

Q You searched that. A Yes, sir.

Q Did you find any heroin? A No, sir.

Q Marijuana? A No, sir.

Q Any other narcotic? A No, sir.

[fol. 93] Q Was it a thorough search or a sketchy search?

A Yes, sir. It was a very thorough search.

Q When did you make that search?

A It was approximately a week after his arrest.

Q Had you been prevented from making an immediate search after the arrest?

A No, sir.

Q Mrs. Gulley allowed you to go in there, did she not?

A She gave her permission to search his room.

Q Now Mr. Cooper has been in custody since last December, has he not?

A That is true.

Q He hasn't gone back to the house. A No, sir.

Q You didn't find any heroin. A No, sir.

Q Now, you mentioned that \$20.00 was given to this Mr. Green.

A Yes, sir.

Q In State funds? A Yes, sir.

Q Do you have a record of the bills? A Yes, sir.

Q Where is it?

A The record of the bills?

Q Yes.

A It's in the arrest report.

Q Well, where is it?

A It's in the details of the arrest report.

Q Well, do you have it here, in San Francisco, Sacramento, or where?

[fol. 94] A Yes, there's one in this court.

Q Well, can I see it?

MR. CURTIN: I'll offer it to counsel to see that, Your Honor.

THE COURT: Would you want some time, Mr. Moran, to look it over?

MR. MORAN: I would like to. Would you rather have me wait?

THE COURT: Well, what I had in mind, it's twenty-five minutes after 4:00. If you want to continue the examination from that, you go ahead. But if you want a little time to look it over—Whatever you wish.

MR. MORAN: This matter is going to come up again. I wonder if it would be convenient to the Court to recess and let me have a few minutes with this so I will be prepared tomorrow.

THE COURT: All right. We'll take a recess, then, until 10:00 o'clock tomorrow morning.

You will make that available to him?

MR. CURTIN: Yes.

THE COURT: All right. We'll take a recess until 10:00 o'clock tomorrow morning.

(Whereupon an adjournment was had until Wednesday, April 11th, 1962, at 10:00 a.m.)



[fol. 95]

APRIL 11th, 1962

10:00 o'clock a.m.

## PROCEEDINGS

THE COURT: The record may show that the defendant is present in court with his counsel.

I take it that you have finished examining the police report.

MR. MORAN: Yes, I have.

THE COURT: You may proceed.

(Witness for the People Howard W. Groom resumes the stand.)

## CONTINUED CROSS EXAMINATION

BY MR. MORAN: Q Mr. Groom, your arrest report indicates that this informant Green was furnished with two \$5.00 bills and one \$10.00 bill, is that correct?

A Yes, sir.

Q And you recorded the numbers of those bills.

A Yes, sir.

Q Were the bills over located after they were given to Mr. Green on February the 21st?

A No, sir.

Q You searched the defendant's person or he was searched?

A He was searched and the money was not found.

Q Now, I understand that this Miss or Mrs. Carr, who was with him when he was arrested on the 21st of December, she was also arrested.

A Yes, sir.

Q And to your knowledge, was she searched?

[fol. 96] A I can only assume that she was. I wasn't present—I wasn't there.

Q You didn't participate, I know. A No, sir.

Q But at your suggestion or recommendation she was searched.

A I went myself to the hospital. The other officers took her in. I assume they had her searched. I wasn't present. I wasn't part of the booking procedure.

Q So far as you know, this marked money or recorded money was not found in her possession.

A That is true.

Q Now, at the time of the arrest, the defendant and Mrs. Carr were accompanied by three children, were they not?

A There were two or three. I don't recall the exact number of children.

Q Now, they had certain packages in their hands, did they not?

A Yes, sir.

Q Did you ascertain from them that there had been—that they had been Christmas shopping in the area, the immediate area of 7th and Macdonald?

A No, sir, I did not ascertain from them.

Q Did you look at the packages that were in their possession?

A No, sir, I did not.

Q To your knowledge did the other officers?

A Not to my knowledge.

Q Did you give any instructions that an effort be [fol. 97] made to determine where these purchases were made and to determine from the clerk in the store whether the money, this marked money, was available at the store?

A I gave no instructions.

Q Do you know if that effort was undertaken by any of the other agents or officers?

A Not to the best of my knowledge.

Q Now, so far as the State agents involved in this matter, were you in charge of their activities concerning this case?

A This is a difficult question. I—I would assume that I might be nominally in charge, although I am just an equal agent working with them. I probably was in Richmond more consistently than any one of the others, and for that reason you might say that I coordinated somewhat.

Q Were you the senior agent in point of service?

A By a matter of fifteen days, yes, sir.

Q All right. Well, for instance, the report, the arrest report, was signed by you.

A Yes, sir.

Q The case, I take it, was assigned to you.

A Cases are very rarely assigned to us. We generally develop them as we go along in the course of our investigation.

Q Well, of the various agents, were you primarily responsible for this particular case?

A Yes, sir, I would say I was.

Q Now specifically, Agent Armenta was a relative [fol. 98] newcomer to the bureau, was he not?

A Yes, sir.

Q In connection with this alleged purchase, did you tell Armenta what his duties were to be.

A Yes, I—I assume, now, that I told Armenta or suggested to Armenta that he go with the operator, Mr. Green, to monitor the phone call and to follow him—stay with him.

Q And you told him to stay with him.

A I can't recall exactly what I told him. This was an understanding. Agent Armenta has worked many, many cases, although he has only been with the bureau a year, and he knows what to do.

Q Did you tell him where he was to position himself?

A No, sir, I didn't.

Q Were you familiar with the area in the vicinity of Newell's Market?

A Yes, sir.

Q I mean prior to December 21st. A. Oh, yes, sir.

Q Had you had any previous, let's say, buys in that parking lot?

A Yes, sir, we had.

Q And could you tell us approximately how many?

A We had one previous buy in that immediate vicinity, connected with Newell's Market.

Q I see. Now, how long—approximately when did that take place?

[fol. 99] A The previous buy I believe was on November the 27th.

Q Now, did you cover that buy or were you assigned to it?

A I worked on that particular case and I assisted in the cover, yes, sir.

Q You assisted in the cover. A Yes, sir.

Q Now, by cover, it would mean the agents assigned to keep the suspects in sight, I presume, or to observe the buy.

A Yes, sir.

Q Where did you station yourself on that occasion, on the occasion of November the 20th?

A Well, first I stationed myself in the vicinity of 536 South 20th Street on that date.

Q And that was your vantage point to observe what was going on in the market—

A No, sir.

Q —in the parking lot.

A You asked me where I stationed myself on that date. That's where I stationed myself in connection with the thing that went on by Newell's parking lot.

Q Well, let's say in the cover activity, when you were covering the parking lot.

A It was nothing to do with the parking lot at Newell's Market on that date. We were—

Q Oh, I perhaps misunderstood you, then. I had understood that there was a surveillance or cover on the parking lot at some—in November.

[fol. 100] A No, sir. There was surveillance on that particular corner, Newell's—we didn't know exactly where it would happen on that particular—

Q Other than Newell's Market.

A Yes. It was to be in that immediate vicinity.

Q I see. Now, actually, that was the same situation that presented itself on the 21st of December; you didn't know whether it was going to be in the parking lot or in the market or where.

A That's correct.

Q All right. Now, why did you instruct Mr. Armenta to use the pay phone at—I believe it's 10th and Nevin, for the purpose of having this informant call?

A I didn't instruct Armenta to make the call from that particular phone. It came—Somebody suggested it. Why it was suggested exactly, I don't know.

Q Isn't it the usual and a good investigative practice in your bureau to have telephone calls of this type recorded?



A It depends entirely on the circumstances in which you are dealing with.

Q Well, tell me when it's good practice and when it isn't good practice.

A Well, it is not good practice when you think the person you call may immediately come to the vicinity where the call is being made; and you then can't take a recording device, for example, into downtown Richmond, [fol. 101] to make a call when you think the man might come and say "I'll meet you in five minutes at such and such a corner." If there's going to be a long range thing, you're going to have to call him and maybe call him back, or you're going to be able to know that you're going to be able to set it up for an hour or two later, then you can make a recording, certainly.

THE COURT: You mean the person you call might say, "Where are you," and he might come right to where the call was made from.

THE WITNESS: Yes, sir.

Q (By Mr. Moran) Well, for instance, Mr. Green, as you know, the informant, was the one quoted as having suggested Newell's, which is 23rd and Cutting.

A Yes, sir.

Q Now, they have recording equipment at the Richmond Police Department which is roughly what, 26th and Macdonald.

A Yes, sir.

Q And you have recorded similar telephone calls at that location at the Richmond Police Department.

A Yes, sir.

Q Now, it's just as convenient, just as quick, is it not, to get from 26th and Macdonald, to 23rd and Cutting, as it would be from 10th and Nevin.

A I would assume—The time limit would be very little different.

Q Now, actually you had had other informants make [fol. 102] other telephone calls to Mr. Cooper in attempts to purchase narcotics, had you not?

A This had been done. I had not, done it.

Q Well, you knew that it had been done.

A Yes, sir.

Q And that no sales resulted.

A That would be correct.

Q And on those other occasions, the phone conversation was recorded, was it not?

A That is true.

Q Now, would you tell the Court what the difference was—I'll withdraw that.

Was Armenta instructed not to record this particular conversation on December 21st?

A Would you repeat that question.

Q Was Armenta, Agent Armenta, instructed not to record the conversation or the telephone call to be made by Mr. Green?

A No, Armenta was not instructed not to.

Q Mr. Armenta said that you had advised him that you had made an investigation or an inquiry with the telephone company, and determined that the telephone number Beacon 2-1879, was listed to the defendant. Is that a correct statement or incorrect?

A I don't know.

Q You don't know whether you told him that.

A The number was looked up, and I—I may have told [fol. 103] him the results of the looking up. I didn't do it. I believe it was done by someone in the Richmond Police Department. I personally have no recollection of personally checking this myself. I may have told the results of the check that was made to Agent Armenta.

Q All right. But in any event you didn't make the inquiry.

A I have no recollection of doing it.

Q And you have no personal knowledge of whether that telephone number is listed to the defendant or not.

A I don't believe the telephone number is listed to the defendant.

Q I see. And you didn't so advise Mr. Armenta as he testified yesterday.

A I told Mr. Armenta that the telephone number was listed to the home of the defendant.

Q I see. That's what you told him. Now, you've also described this 1957 Oldsmobile as Cooper's car. Is he the registered or legal owner of that car?

A No, sir, he is not.

Q I'm sorry. A No, sir, he is not.

Q How many agents, officers, patrolmen, participated in the arrest of Mr. Cooper on the street.

A Myself, Agent Yates, Sergeant Billingsley and Officer Stumpf, and Agent John Lee was present. Whether he participated—Yes, he must have participated in the arrest; he was there. Five.

[fol. 104] Q Sullivan was there? A No, sir.

Q Armenta was there? A No, sir.

Q Lopez there? A No, sir.

Q McBee? A No, sir.

Q I'm just guessing at the pronunciation here. Wooshness?

A Wooshness was not there.

Q Now, you recall describing all of the names I have mentioned here, as well as the names you have mentioned, in your report as being the arresting officers in this arrest of Joe Cooper.

A That is a statistical report. The purpose of that is for statistics in Sacramento. And most of these men at one time or another had some part in the investigation of Joe Cooper.

Q They were not arresting officers or they were not present at the arrest.

A We put down anyone who had any part in the investigation for purposes of statistics in Sacramento.

Q I don't want there to be any misunderstanding. They were not present at the arrest, other than the ones you mentioned.

A They were not even in Richmond.

Q I see. Now, would you describe for the Court by standing up there the motions that Mr. Cooper went through when you and Yates came up behind him.

A I will describe it the best that I can recall at this time.

[fol. 105] Q Surely. As I understand he was by his car. Maybe you could pick up some object—

A This would be the front door of his vehicle, the passenger's front door.

MR. CURTIN: Pardon me, Your Honor.

I'm sorry, Mr. Moran. Could the witness describe—

When he says, "This would be the front door of the car", could he have the record show—

MR. MORAN: Well, he's standing at the end of the bench.

MR. CURTIN: Thank you.

A He, as I recall, was putting his key into the lock of the door. I came up on his right, Agent Yates came up on his left, showed his badge, said "Joe, you're under arrest." Joe turned to him, and then I, as I recall, took him by his right hand at that time. And Joe said, "It's in there. It's over the sun visor."

THE COURT: Looking into the car.

THE WITNESS: Looking into the car. He bent down to look into the car.

Q (By Mr. Moran) I see.

A And as I recall, Yates said, "What's in there?" And he said, "Marijuana cigarettes," or something—"Marijuana cigarettes, but I didn't put them there, somebody else did."

THE COURT: Did he remain bent down?

A Then he went down again. (Demonstrating) It was like this.

[fol. 106] Q I see.

A To the best of my recollection.

Q All right.

A And then at that point his hand came over, went into his shirt pocket, somebody said, "He's going for his pocket," or "He's going for his mouth," or something, whatever he said. And I saw the thing come up. I grabbed his hand, thumb out.

Q He continued to be bent over.

A Yes, he was still bent like that.

Q I see.

A And he forced everything in.

Q You were off to his right and behind him, were you not?

A No, sir. I was to his right and alongside and toward the latter part of that in front of him.

Q I see. But while he was bent over reaching for his pocket, you could see something was put into his mouth.

A I saw something in his hand, come out of his pocket in his hand.



Q I see.

THE COURT: His left hand.

THE WITNESS: His left hand, yes, sir.

Q (By Mr. Moran) You could see what it was, generally.

A It was a package wrapped in brown paper.

Q You're sure of that. A I'm positive.

Q You got a good look at it.

[fol. 107] A It was that far away from me. (Indicating)

MR. CURTIN: Could we indicate—

THE COURT: Indicating a matter of six or seven inches.

MR. CURTIN: Thank you.

Q (By Mr. Moran) And it was something wrapped in brown paper.

A Yes, sir.

Q And roughly the size that the People's Exhibit 4 would have been when all of the various papers were—

A That paper wasn't on it.

Q I see. Not this paper. The largest brown paper was not on it.

A That was not on that particular thing that you're dealing with now.

Q I see.

THE COURT: Well, for the record, what was the size of this object?

THE WITNESS: I think that counsel is fairly describing it. It was slightly larger—

THE COURT: Half an inch by an inch?

THE WITNESS: Oh, I see.

THE COURT: Something like that?

THE WITNESS: That's about an inch long and possibly—

THE COURT: Little over an eighth of an inch thick.

THE WITNESS: Quarter of an inch in diameter, perhaps, or more.

[fol. 108] Q (By Mr. Moran) Now, perhaps I forgot about this yesterday or didn't see it or didn't perhaps see that. Where does this piece of paper come in? Or has it been described by any of the witnesses.

A This has not yet been described or brought up.

Q I see. Now, you eventually ascertained, did you not, what amount of narcotics was in this—in these bindles, as you have described.

A I, sir, did not—

Q Well, Mr. Reeves did.

A Mr. Reeves did. That was done.

Q And that's indicated on your laboratory report. (Handing)

A (Examining) That's one paper, 0.1050G; number two paper is 0.1426G.

Q G standing for what? A I don't know.

Q You don't know. A No. I didn't write it. I don't know what he was indicating.

Q You had no occasion in the course of your work for the past three years to use that term—

A Oh, yes, sir.

Q —in a laboratory report on heroin?

A Yes, sir. But I don't feel prepared to testify to somebody else's personal notes.

Q I didn't say you were to testify to those. What is the term 'G, generally?

A G, I have no idea.

[fol. 109] Q Doesn't mean grains.

A Doesn't mean a thing to me, G; it means nothing.

Q Or the designation that Reeves has used there. That designation means nothing to you.

A To me, no, sir.

Q I see. Have you ascertained from any other source what amount of heroin was involved in these two bindles?

A That was the first time just now looking at that thing that I had ever ascertained how much was in the bindles.

Q Well, can you tell us now how much was in there?

A I don't know.

Q So you haven't ascertained yet. A No, sir.

Q Have you learned in your three and a half years experience with the Bureau of Narcotic Enforcement what the effect would be of swallowing heroin?

A It would depend upon the strength or the quantity, quality—strength of the heroin; it would depend upon how it went into the person's system; it would depend upon the person's body build. It would be difficult to say.

Q Well, you tell me, then, assuming a person swallowed heroin, what would the average or normal amount be that would cause death? The smallest amount that would cause death.

A Again, I couldn't possibly say.

Q You have no information on that.

A It would depend upon whether the person had been [fol.110] using heroin, whether they had developed a tolerance for it. If they had developed a tolerance, how high their tolerance was. There are many variables.

Q All right. Now, you have ascertained here, have you not, that the defendant Joe Cooper, to your knowledge, is not a user of heroin.

A Not to my knowledge he isn't.

Q All right. So assume that a person of his build, which I think you have indicated here is five foot nine, weight, 220 pounds, he's thirty-eight years of age. He's, according to your report, not addicted. He had no hyperdermic marks on him, did he?

A I don't know.

Q Mr. Cooper had no hyperdermic marks—

A I didn't examine him for hyperdermic marks.

Q Well, this report is signed by you. A Yes, sir.

Q Did you dictate this to somebody? A Yes, sir.

Q Somebody furnished you that information?

A I was told that he had no marks.

Q All right. Assume a person, then, of the type that we've just described, from your arrest report, swallows heroin. What amount would kill a man of this description? What is the smallest amount that would kill such a man?

A To answer you absolutely truthfully, I don't know. If it was pure heroin, I couldn't tell you the minimum amount—I couldn't tell you—that would actually kill a person.

[fol.111] Q Well, you're an expert. I'm not asking you to give me perhaps the exact amount. I want your professional and expert opinion in this regard.

A I don't know.

Q You don't—

A I honestly don't know.

Q You don't know. Which of the agents involved in this case would be qualified to give an answer on that, agents or officers?

A Possibly the chemist.

Q Mr. Reeves? A Possibly.

Q Mr. Groom, you created the impression, at least with me—I think you tried to convey it and did convey it to the Grand Jury and in your arrest report, that in your considered opinion this package that you said the defendant swallowed; was heroin.

A Yes, sir.

Q Now, have you made any attempt in the course of your investigation to find out for our information and the Court's information, what the effect on a person would be if he had swallowed heroin?

A I made an attempt to find out if he had swallowed heroin. And if that had been the case, I might be better prepared. He refused to take a test. We couldn't do anything about it.

Q You saw him that day; you saw him the next day. [fol. 112] A Yes, sir.

Q Heroin being swallowed by a man has an effect on him, does it not?

A It certainly should have, yes, sir.

Q Did you observe if that heroin had the usual effects that heroin would have if swallowed by a person?

A I have never dealt with persons that swallowed heroin, sir. I couldn't tell you what the usual effect would be of ingesting it orally.

Q Would you, during the next recess, find out from your superiors in the Bureau of Narcotic Enforcement if there is an expert or an employee who is familiar with such information.

A I will certainly do so.

MR. CURTIN: Well, Your Honor—

Pardon me, Counsel.

I would object that this would now be calling for medical testimony. The agents are qualified as experts in dealing with persons in the narcotic traffic.

THE COURT: Well, there really isn't any question pending, Mr. Curtin. He's asked the witness to make some investigation for him.



MR. CURTIN: As to an agent being qualified to testify as a medical—

THE COURT: Well, there really isn't any question pending at all to the witness. Mr. Moran has simply [fol. 113] asked him to ask the superiors what the effect would be of orally taking heroin.

MR. CURTIN: I again would object that this would be calling for speculation, because the facts in this—

THE COURT: I don't know what it calls for. It calls for him to ask his superiors what the results of certain things would be.

MR. CURTIN: All right.

THE COURT: Do you have any objection to him being required to do that?

MR. CURTIN: I'll withdraw the—

THE COURT: There isn't any question pending, actually.

MR. CURTIN: I'll withdraw it.

Q (By Mr. Moran) Did you make some search of Mr. Cooper on the street when you arrested him? A cursory or preliminary search.

A Yes, sir. A search was made. I didn't make it.

Q Were you present?

A I believe I was arresting Mrs. Carr about that time.

Q Did you observe whether or not he had some—what he's described as breath pills, some kind of a compound in his shirt pocket?

A I didn't see anything that was taken from him.

Q Who, as you recall, made that search?

A I don't recall.

[fol. 114] Q All right. He subsequently told you, did he not, that at the time of the arrest or just prior to the arrest that he had been drinking quite heavily?

A Yes, sir.

Q And you observed the fact that there was the odor of alcohol?

A No, sir, I didn't.

Q Did you attempt to ascertain that fact?

A No, sir.

Q He told you also that he believed that he either put in his mouth some of the breath pills or perhaps a marijuana cigarette.

A He said both things, yes, sir.

Q Now, Mr. Cooper was not questioned by you or any of the agents of the Bureau of Narcotic Enforcement after his arrest—I mean the day of his arrest, following his arrest.

A Again, there were other agents, and I wasn't there; I was down at the hospital. Now, who talked to him and what they said, I don't know.

Q Is heroin—I think you described it as a white crystal, was that correct, or white powdery substance?

A Heroin in its pure form or its nearly pure form is a white crystalline powder, yes, sir. It is not always white.

Q I see. And People's Exhibit 4, which we had a moment ago, that was white, as I understand your testimony yesterday.

A Yes.

[fol. 115] Q And that would be some indication that it is pure.

A No, sir.

Q Or nearly pure. A No, sir.

Q Perhaps I misunderstood you. A I say—

Q When it's in a white powdery form, what does that indicate?

A It indicates nothing whatsoever.

THE COURT: Well, it would indicate that whatever was used to cut it with was also white.

THE WITNESS: That could be, yes, sir. It could be cut with white material, also.

As far as the quality of the heroin is concerned, it has to be done chemically by a quantitative analysis. You can't—No one can tell by looking at it or even by tasting it or smelling it what the possibility of its being pure is.

Q (By Mr. Moran) But again, heroin in a pure state is white.

A Yes, sir.

Q And in an unpure state—

A It can also be white.

Q I see. Can it be an other colors?

A Heroin, when it's first manufactured, depending on the manufacturing process, can also be brown or pink.

Q I see.

A But generally, if it's well manufactured, if it's done properly, it's white.

Q And from the brown or pink color, does it remain that color or does it change to white?

[fol. 116] A No, it stays that color.

Q I see. Now, are there any other narcotics in powdery form that you are aware of that are brown in color—in powder form.

A Opium.

Q I see. Would that be about the same shade as heroin?

A No, opium is much darker brown.

Q I see. All right. Now, as I understand it, you proceeded on December 21st around—sometime during noon hour, 12:30—or between 12:30 and 1:00, to 23rd and Cutting.

A Yes, sir.

Q And you were parked on the north side of Cutting at 23rd and Standard station for a time.

A Yes, sir.

Q And after you observed Armenta and Mr. Green arrive at a point in front of Newell's, you saw Green go into the parking lot, did you not?

A Yes, sir.

Q Now, at that time you left your automobile, as I understand.

A Yes, sir.

Q Did Lieutenant Sullivan remain there?

A Yes, sir.

Q And you proceeded west. A Yes, sir.

Q Now, in order to—You went behind the service station; that is, there was the Richfield service station between you and Newell's Market.

[fol. 117] A Yes, sir.

Q Now, that service station extends about half the length of the block on Cutting between 23rd and 22nd, does it not?

A I wouldn't say half. But—it's a good portion of the block.

Q Substantial distance. A Yes, sir.

Q And immediately behind that service station and running for its length is a solid redwood fence, is there not?

A Yes, sir.

Q And approximately six feet high, isn't that correct?

A Approximately, yes, sir.

Q How tall are you? A Six feet.

Q All right. Now, as you proceeded behind the Richfield service station, I assume that you could not see either Armenta or Green.

A No, sir.

Q Then beyond that service station and beyond that fence, and facing on 22nd, is the—is an apartment house with a porch on the south side of it.

A Yes, sir.

Q And the porch is on the second floor. A Yes, sir.

Q And that's the one that you mentioned yesterday.

A Yes, sir.

Q Now, showing you Defendant's Number 1, it's a photograph of the apartment house, is it not? (Handing)

A (Examining) Yes, sir.

Q And to see the market—Let's face around here so [fol. 118] the Judge can see that, also.

To see the market you look out over this adjoining house, do you not?

A You look over this—this lower roof you can see over it clearly. The upper roof blocks your view, not of the market but of the lot.

Q All right. So by looking over the lower portion of the roof, you can see about one-third of the—or one-quarter of the easterly edge of the parking lot—easterly side of the parking lot.

A Yes, a third or—a third or a half. I can't recall exactly what it is. You can't see the entire lot, certainly, but you can see a good easterly portion of it. To break it down into thirds or quarters, I couldn't say.

Q All right. But then this roof line, the higher roof line of that adjoining house blocks the view of the westerly side of the parking lot.

A Yes, sir.



Q Now, I believe you mentioned this fence around the apartment house was since constructed.

A Yes, sir.

Q Now, at one point you left the porch, did you not, and came down to some other point.

A Yes, sir.

Q And where was that?

A It was right along this outer corner of this building [fol. 119] ing here, the projection of this building.

Q I see.

A I may have moved over. I can't recall now whether I moved over to the corner of the fence and then moved back. I made some movement there to try and conceal myself and still keep the whole thing in view.

Q Well now, it would be true, would it not, that in going up and down these stairs, your view of the parking lot is cut off completely.

A I don't recall. But it's entirely possible.

Q Well, do you recall that this house, this small part of this house, projects more easterly than the edge of the apartment building.

A That may be so. I don't recall.

Q But in any event, it's true that at times as you were going from the service station here over to this point, that the fence behind the Richfield station blocked your view.

A I believe I could see over that fence. But it would certainly block my view to a large extent.

Q And you had to look where you were going, too, I presume.

A Certainly.

Q And you had to look where you were going when you went up the stairs.

A That's right.

Q And when you came back down the stairs.

A That's right.

[fol. 120] Q So there were occasions when you were not able to keep Green in view.

A That's true.

Q Why did you go up on the porch?

A So I would have a view of the parking lot and Mr. Green, so I'd be able to keep him in view at all times.

Q Because of the elevation. A Yes, sir.

Q Actually, when you were down standing by this building on ground level, it's somewhat—it's a level lot there, is it not?

A That's right.

Q Substantially level. You had an imperfect view of the parking lot, did you not?

A Yes, I had a good view.

Q I see. But again, you originally chose the elevated point for a better view.

A No, I originally chose it primarily because I would be less obvious at that point.

Q You mentioned yesterday that when you saw Cooper's car after coming down off the porch, it was in the westerly and central part of the parking lot.

A To the best of my recollection, yes, sir.

Q Now, do you know how those lanes face in the central part of the parking lot?

A Uh-huh.

Q In what direction from your vantage point?

[fol. 121] A Well—

Q Would the car be head-on or at an angle?

A The lanes are at a single angle, north. They're not straight.

Q They're not straight. Now, however the parking lanes immediately next to the sidewalk on Cutting are straight.

A Definitely.

Q At right angles. A Yes, sir.

Q Then behind that, the various rows are angled to the street.

A Yes, sir.

Q Now, showing you Defendant's Examiner's Exhibit Number 2, is this substantially the view that you would get after you came down off the porch and were standing next to that building? (Handing photograph)

A Yes, sir.

Q Did you ever ascertain how far you were away from this car you've described as Cooper's, from your surveillance point that you have described here.

A Never accurately, no, sir.

Q What in your opinion would be a fair estimate?

A Well, Lieutenant Sullivan told me that Cutting Boulevard at that point is 65 feet wide. So by extension, I would say that I was probably 140 or 150 feet away.

Q From the central—that is, your vantage point, south, to the—somewhere near the center of the parking lot.

[fol. 122] A That's my estimate.

Q A hundred and fifty feet. Mr. Groom, because I believe it's important—maybe you haven't had an opportunity to do so—I paced that distance off. It's 72 yards, which would be 156 feet. Would it be convenient for you to check my figures?

A You mean—

Q At noontime.

A Not at noontime, no sir. Oh, if I'm off the stand I'll be glad to go, yes.

Q Maybe—Could you have an officer—call an officer down in Richmond to take a measurement from, first of all the porch, or in line with the edge of that apartment building, south to the middle of the parking lot.

A Yes, sir, I'll do that.

Q Thank you. You mentioned certain times in your arrest report, Mr. Groom. And I call your attention to the following: "The defendant arrived at the parking lot at 12:55 p.m." Who did you get that figure from?

A I don't recall. After the thing was all over with, we sat down and put all—the best we could—some people made notes of times here and times there, and we—I tried to put it down the best I could from—I personally took no notes on times and so on and so forth.

Q Well—

A And I talked to the fellows, what time did this [fol. 123] happen, what time did so and so forth, to try and get some close estimate of time.

Q In other words, in talking to all of these officers you made notes as to certain events.

A Yes, sir.

Q Where are those notes? A In my pocket.

Q And do they indicate which officer told you what?

A No, sir.

Q Let me see those notes.

A (Producing documents and handing)

Q Do you have 12:55 indicated in there?

A 12:55. (Indicating)

Q And what do those notes indicate to you again?

A Well, it's, "Cooper shows, S.E. walks over, stands on the driver's side, walks away—makes a pass and walks away."

Q Now, so 12:55 is also indicated in your report and is the time that Cooper's car entered the parking lot, is that correct?

A Is that on my report? If it is, that is what I wrote.

Q Would you just refresh your recollection, and—  
(Handing report)

A (Examining) Yes, sir.

Q In other words, 12:55 you wrote, "The defendant arrived at the parking lot.

A S.E. walked over and contacted him.

Q Right. Now, Green, after the contact was made, [fol. 124] walked back to 23rd and Cutting to the corner.

A Yes, sir.

Q What time did he arrive there?

A Well, the notes and the report indicate 12:57. He left Cooper and walked back to the corner.

Q So in a two minute period, Cooper arrived at the parking area, parked his car, Green came up to him, and left and walked back to the corner of 23rd and Cutting.

A These notes and that report, the times don't purport to be absolutely accurate. I mean, this is to try and pull the thing together in the timing. It might be two minutes, it might be two and a half minutes. I don't know exactly. That's the report.

Q Well, it's not important, you say?

A No, I say that is what I wrote in the report.

Q Well, you try and be somewhat factual in your report, don't you?

A I try— Yes, to show the picture as factually or logically as I can.

Q Now, actually, Armenta—Agent Armenta, when he told you what to write down in his report as to what he had seen, told you, did he not, that he kept Green constantly in view from the time they left the Richmond



Police Department until the time they returned to the Richmond Police Department.

A I don't follow your question.

Q Well, my question is, did Armenta tell you that?  
[fol. 125] A No, that's something I wrote. I wrote that down from my own knowledge and my participation in the investigation.

Q Well, now, what did you write down about what Agent Armenta can testify to? In other words—

A He can be—

Q Let me withdraw that. As part of your detailed case report, you made a summary as to the testimony of the different witnesses.

A Yes, sir.

Q All right. Now, read for the record what you said as to Agent Armenta.

A "Agent Armenta can testify to being present when the informant was searched by Agent Groom, to monitoring the phone call and to keeping the informant constantly in view from the time they left the Richmond Police Department until the time that they returned."

Q Now, how did you learn that he claimed that he kept the informant constantly in view?

A I observed him. I was there.

Q You observed him constantly keeping Green in view?

A He was right with Green all the time.

Q I see. You heard him testify yesterday that for a full two minutes while Green was in the parking lot he couldn't see him at all, did you not?

A Yes, sir.

Q You heard him testify that he was pacing back and [fol. 126] forth, did you not, with his back to the parking lot at the time.

A Yes, sir.

Q You heard him testify that half the time he was watching you.

A I don't recall him testifying to that.

Q Do you recall him testifying that he watched you progress—

A Yes, sir.

Q —in a direction opposite from the parking lot behind the fence?

A Yes, sir.

Q Officer Groom, do you claim in this report that you had Green constantly in view from the time of the phone call until the time he handed the bindles of heroin to Agent Lee?

A Yes, sir. I claim that in that report.

Q Is it true?

A You have shown some minor exceptions.

Q Is it minor, Mr.—Let me put it this way: Was there anything about Mr. Green in your dealings with him before December 21st that led you to believe that he was an honest and trustworthy informant?

A Nothing whatsoever.

Q Now, you believed him to be unreliable, as a matter of fact, did you not?

A Yes, sir.

Q And you took certain precautions in order to overcome that unreliability of this informant.

A Yes, sir.

Q And one of those upon which your entire investigation was based, was to keep him constantly in view.

A Yes, sir.

Q And another was to put marked money on him so that it would be transferred to a suspect and later recovered from the suspect.

A Yes, sir.

Q To show a chain. A Yes, sir.

Q Green was arrested by you early that morning of the 21st for the sale of heroin.

A Yes, sir.

Q Subsequently prosecuted, A Yes, sir.

Q Was he sentenced? A Yes, sir.

Q For what offense?

A He was prosecuted and sentenced for possession of heroin.

Q For possession of what? A Of heroin.

Q And received a County Jail sentence? A Yes, sir.

Q You had reached an agreement with him, had you not, for him to act as an informant.

A Yes, sir.

Q And he was never prosecuted for selling heroin.

A No, sir.

Q That's what your warrant was for, however, the warrant upon which he was arrested.

[fol. 128] A Yes, sir.

Q Green, when he left the parking lot, returned to Agent Lee's car.

A Yes, sir.

Q You saw him get back in the car. A Yes, sir.

Q At that time you got a signal, I believe you said from Lee, that he had scored or that you had scored or that somebody had scored, two bindles.

A Yes, sir.

Q Was that expression used? Scored two bindles?

A I believe that was correct, yes, sir.

Q Indicating that a purchase of two bindles of heroin had been made.

A Yes, sir.

Q You then—Did Lee turn these bindles that you mentioned over to you at that time?

A No, sir.

Q Later in the afternoon, had he?

A In the Richmond Police Department.

Q What time?

A Approximately—I don't know. It was between 1:00, 1:30, possibly, somewhere around there.

Q You subsequently turned them over to Mr. Reeves, the criminologist?

A Yes, sir.

Q What time was that? A 10:00 o'clock the following morning.

Q So it was sometime after 10:00 o'clock the following morning that you—that Mr. Reeves made his examination and determined that it was heroin.

A Yes, sir.

Q You testified that you followed Cooper from this parking lot after this alleged transaction and followed him for three blocks and lost him.

A Yes, sir.

Q Why didn't you arrest him after this purported sale was consummated and Lee gave you the signals that you scored two bindles?

A We didn't know at that time that it was heroin.

Q I see.

A We hadn't made any tests.

Q I see. And Agent Lee had looked at it, I believe you said.

A He looked at the package.

Q I see. You didn't know it was heroin until after 10:00 o'clock the next morning, either, did you?

A I had made a test that indicated to me that it was heroin earlier that afternoon.

Q The whole purpose of the marked money, again, was to get it on the suspect's person, was it not?

A That's right.

Q Now, in addition to you and Sullivan, there were two other—at least two other cars of law enforcement of-  
[fol. 130] ficers in the immediate area, were there not?  
Is that correct?

A That's right, yes, sir.

Q Were they connected by radio transmitter?

A There were—My car and one other car had radio communications.

Q Yates— A The third car did not.

Q Yates and Stumpf were in radio communication, were they?

A With Sullivan and I.

Q Was it important to you to keep this man in view?

A Not particularly.

Q I see. So that's why you got out six men or so in that afternoon to hunt all over Richmond for him, is that true?

A I don't follow your question, sir.

Q I'll withdraw it.

MR. MORAN: I am through with these questions.  
But as I understand it, you will be available after the lunch recess.

THE WITNESS: Yes, sir.

MR. MORAN: Thank you.



THE COURT: Well, it's 11:00 o'clock. Do you want to—

MR. CURTIN: I have some redirect, Your Honor.

THE COURT: How long will it take?

MR. CURTIN: Oh, approximately ten minutes.

THE COURT: Well, we'll take our recess first, then. We'll take our mid-morning recess.

(Recess taken)

[fol. 131] (After recess)

THE COURT: Let the record show that the defendant is present in court with his counsel.

Proceed, Mr. Curtin.

MR. CURTIN: Thank you, Your Honor.

### REDIRECT EXAMINATION

BY MR. CURTIN: Q Mr. Groom, Mr. Moran in his cross examination of you referred to another piece of brown paper that was in People's Number 4 for identification.

MR. CURTIN: (Handing)

MR. MORAN: (Examining)

MR. CURTIN: And may the record show that Mr. Moran is looking at it at the present time.

THE COURT: Yes, it may.

Q (By Mr. Curtin) And I'll show you this piece of brown paper and ask you, sir, if you can tell his Honor, the Court, if you can identify that, sir.

A That's the piece of paper that I took to Mr. Reeves for possible comparison that I found in the glove compartment of Joe Cooper's Oldsmobile.

Q And when did you find that piece of paper, Mr. Groom?

A 12/29/61.

Q That would be approximately a week after the occurrence.

A Well, I'm not certain. I didn't—Unfortunately, I didn't initial it. And Mr. Reeves put 12/29/61, and I must assume that he initialed it as soon as I gave it to him.

[fol. 132] Q But you did hand that to him personally, sir.

A Yes.

Q And do you recognize Mr. Reeves' signature?

A Yes, sir.

MR. CURTIN: Your Honor, this was a part of People's Number 4 and obviously it had been so identified prior to now. And there are the two—

THE COURT: Well, it's a piece of brown paper approximately three by five inches contained therein. Do you want it marked separately?

MR. CURTIN: No. So that the record will show that it's all a part of People's Number 4, Your Honor.

THE COURT: Yes.

MR. CURTIN: Fine.

Q (By Mr. Curtin) Now, you were asked on cross examination about searching a room that belonged to Mr. Cooper. And what was that address, sir?

A It was at 536 South 20th Street, Richmond.

Q And who lived there when you made the search, sir?

A Leona Gulley.

Q And to your knowledge, was she related in some way to the defendant in this matter, Mr. Joe Cooper?

A She told me that she was his aunt.

Q She is present here in court. You've seen her outside?

A She is out in the hall.

Q Now, you were asked on cross examination about [fol. 133] another event occurring in the area of 23rd and Cutting. And I believe you stated a date that I marked down as November 27th.

A Yes, sir.

Q Refreshing your memory on that date, is that the date of November 27th, 1961, that you were referring to?

A No, sir. I was incorrect. That was the—The date that I testified to as November 27th was actually December the 7th.

Q And that would be December the 7th, 1961, is that correct, sir?

A Yes.

Q And is that the date that you told Mr. Moran on cross examination that you had stationed yourself in the vicinity of 536 South 20th.

A Yes, sir.

Q Did you see Mr. Cooper, the defendant, at all that day?

A Yes, sir, I did.

Q And did you see any other person with Mr. Cooper on that day?

MR. MORAN: If the Court please, I'm going to object to this as improper redirect examination.

THE COURT: It will be overruled.

A No, sir, I saw no one else with Mr. Cooper on that day.

Q (By Mr. Curtin) Did you see Mr. Cooper's automobile on that day?

A Yes, sir. Mr. Cooper drove up to his house and got out of his automobile, the 1957 Oldsmobile that we have been referring to as his automobile, and went into the house.

[fol. 134] Q Did you see someone else use the car on that day?

A Yes.

Q If you did.

A A woman who we identified as Edna Faye Carr came out of the house and used that car.

Q Is that the same person that was with Mr. Cooper on the 21st of December, 1961, when he was arrested at 7th and Macdonald in the City of Richmond?

A Yes, sir.

Q And where did you see Edna Faye Carr go in the car, if you did, sir?

A She drove to Newell's Market and—

MR. MORAN: If the Court please, may I renew my objection as to this being improper redirect examination.

THE COURT: Yes, I think this is going a little far afield, Mr. Curtin.

MR. CURTIN: All right.

THE COURT: It will be sustained.

Q (By Mr. Curtin) Now Mr. Moran asked you on cross examination if you had done anything with Mr. Cooper or tried to determine anything as to the effect of

heroin upon him after his arrest on December the 21st, 1961. And I believe you told him that he had refused to take a test.

A Yes, sir. He was offered the opportunity to take the Naline test at the Oakland Clinic on Saturday, December the 23rd. He refused.

[fol. 135] Q And on cross examination I believe you told defense counsel that Mr. Cooper had stated that he had swallowed on one occasion marijuana, and then he stated also that he had swallowed breath pills.

A Yes, sir.

Q Can you tell us the order in which he told you those things, if you can remember?

A He told me first that he had swallowed marijuana. And then later in the course of the same interview he changed to saying that he had probably swallowed—or possibly swallowed some breath pills.

MR. CURTIN: That's all I have of this witness at this time, Your Honor.

THE COURT: Any recross, Mr. Moran?

### RECROSS EXAMINATION

BY MR. MORAN: Q Had you seen Mrs. Carr use this 1957 automobile on more than one occasion?

A I only saw her drive it on that one occasion.

Q You hadn't kept a constant surveillance on this car.

A Not a constant surveillance, no, sir.

Q Now, you've talked to Mrs. Carr, have you not, in connection with various investigations.

A I talked to her very briefly in connection with this one investigation.

Q Did you ever ask her about her using this car?

A No, sir, I don't believe I did.

[fol. 136] Q Did she tell you that a relative, a close relative of hers, has a car identical to this 1957 Oldsmobile, same color, year?

A Mrs. Carr refused to state anything to me.

Q Do you know how many cars there are in Richmond, 1957 Oldsmobiles of this type and color?

A I have no idea.



Q When you saw her in this car near 536 South 20th, did you keep any notes on that occurrence?

A There were notes made, yes, sir. I don't have any now with me.

Q You don't have any now? A No, sir.

Q Did you note the license number of that car at that time?

A I can't recall.

Q Incidentally, where was—when you searched this car, this 1957 Oldsmobile, where was it when you first searched it? I think you said Richmond.

A The Beacon Tow Service in Richmond.

Q And it was there when you located this piece of paper that's part of exhibit four?

A Yes, sir.

Q Now, you didn't initial it? A No, sir.

Q Now, you didn't refer anywhere in your detailed case report to finding that piece of paper, did you?

A No, sir.

Q Now, this detailed case report was dictated or typed. [fol. 137] by you at some date after December 29th, 1961, was it not?

A I can't recall. I'd have to look at the report.

Q Well—

A Even then I'm not sure I—

Q I don't see a date, but perhaps you could—

A I probably dictated it around the 23rd or the 24th, as a matter of fact.

Q Of what month? A Of December, 1961.

Q (Handing report)

A (Examining) I can't tell. It's—

Q Well, let me call your attention to part of it. When you dictated this report, where was the car?

A I don't know.

Q Well, where was it stored at, at the time your report was written up?

A I don't know.

Q Well, what does it say on the report?

A It says the Memorial Temple Garage, San Francisco, California. I would put that other car whether it was there or not.

Q Really? A Yes, sir.

Q Could you go through this report, underline what parts you put in, whether you knew it to be true or not?

A In that particular case, the car would automatically be towed to the Memorial Temple Garage, so I would dictate that for the report.

Q Would you have something here that shows when [fol. 138] you wrote this up?

A No, sir. That's the weak part of our report to show the actual date we write it. It's not on there.

Q I see. Now, you're quite sure, however, that the search was made while the car was still in Richmond.

A Yes, sir. I went with Sergeant Billingsley—I didn't know where the lot was, even. He had to show me.

THE COURT: Do I understand that all cars are towed to this garage that are involved—or may be involved in the transportation of narcotics?

THE WITNESS: All cars that are seized by our bureau are impounded in a locked area in the Memorial Temple Garage, in that one place.

THE COURT: In that garage.

THE WITNESS: Yes, sir.

Q (By Mr. Moran) What work was done by Agent McBee on this case?

A Agent McBee and I staked out two or three times on Mr. Cooper's home.

Q And Agent Lopez?

A Agent Lopez and I also staked out on Mr. Cooper's home. Agent Lopez observed Mr. Cooper on the street on several occasions.

Q This was prior to December 21st? A Yes, sir.

Q And Agent Wooshness. When was the period of his activity in the case?

[fol. 139] He was along on one or two of the stake-outs. Exactly when, I can't say.

Q Now, you testified for the Grand Jury, did you not, in connection with this case.

A Yes, sir.

Q And that was on or about January 15th, 1962.

A Yes, sir.

Q Now, in that testimony, did you give any testimony concerning this paper which you found in the glove com-

partment that's part of exhibit number four, People's Exhibit Number 4?

A No, sir.

Q Did you know about it at that time? A Yes, sir.

Q Mr. Reeves compared it at that time. A Yes, sir.

Q Is there some way of ascertaining—for you to ascertain what date this detailed case report was written up?

A I probably can find out the date that it came out of typing from our office records.

Q Did you make a subsequent addition to the detailed case report which reflected this search?

A No, sir.

Q I believe you said you have no notes covering the date you made this search or the results of it.

A No, sir.

MR. MORAN: That's all.

MR. CURTIN: Nothing further at this time, Your Honor.

[fol. 140] THE COURT: You may step down, Mr. Groom.

Call your next witness.

MR. CURTIN: We'll call Lieutenant Sullivan.

#### NORMAN WESLEY SULLIVAN,

called as a witness on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: What is your full name, please.

THE WITNESS: Norman Wesley Sullivan.

THE COURT: Just take the witness chair there, Mr. Sullivan.

#### DIRECT EXAMINATION

BY MR. CURTIN: Q Mr. Sullivan, what is your address, please, for the record?

A 1726 Costa Avenue, Richmond.

Q And what is your business or occupation, sir?

A I'm a lieutenant in the Richmond Police Department.

Q And on December the 21st, 1961, what was your connection in the Richmond Police Department at that time?

A I was a lieutenant in charge of the vice squad.

Q And that normally deals with the narcotic investigations, is that correct, Lieutenant?

A That's right.

Q On that day, did you have occasion to be with any State agents in an investigation?

A Yes, sir, I was.

Q And who were you with on that day, sir?

[fol. 141] A Agent Groom and Agent Armenta.

Q And Lieutenant Sullivan, where was it that you were with them on that date?

A That was in the City of Richmond, in the vicinity of 23rd Street and Cutting—South 23rd Street and Cutting.

Q And before you got to that location, where had you started from?

A The Richmond Police station.

Q And who was there when you started from that location, sir?

A Agent Armenta, Agent Groom, Agents Lee and Yates, Agent Billingsley, Officer Stumpf, myself. I believe that's all.

Q And was there some other person with the law enforcement officers?

A A man by the name of Frank Green.

Q And for the record, what does Mr. Green look like, sir? Or what did he look like on that day?

A He's a colored man—

Q All right, sir. And would you tell us what was done in regards to Mr. Green, if anything, at the police station before you went to 23rd and Cutting, as you told us?

A He was searched by Officer Groom—or Agent Groom.

Q And tell us what happened in connection—Tell us what happened next after this, Lieutenant Sullivan?

A He left the police station, went to Nevin Avenue between 11th and 12th, where Agent Armenta and Frank Green placed a phone call.



[fol. 142] Q Where were you, sir, when this occurred?

A I was on the north side of Nevin a short distance from the phone booth.

Q With whom were you, sir? A With Agent Groom.

Q And the two of you were in a vehicle, weren't you, sir?

A Yes.

Q And after you observed this event, tell us what happened next?

A Agent Groom and myself, Agent Lee, Agent Armenta and Frank Green, Agent Yates and Officer Stumpf, all went to the vicinity of South 23rd Street and Cutting.

Q And at the location of 11th and Nevin, was there any message or communication received by you from anyone, or that you heard?

A I didn't—I heard Officer Groom ask—or Agent Groom ask Agent Armenta if everything was all right, and he said yes, that it had been set up.

Q All right, sir. Well, Lieutenant Sullivan, then you said you went to 23rd and Cutting.

A Yes.

Q Tell us how you got there and with whom you were.

A I was with Agent Groom. We drove to South 23rd, parked in a Standard station on the corner there and observed the buy take place down there.

Q Lieutenant Sullivan, tell us what you first observed when you parked in the service station at 23rd and Cutting.

[fol. 143] A I saw Frank Green walking south on 23rd Street from Virginia on the west side of the street, and Agent Armenta walking south on 23rd Street on the east side of the street.

Q I'm going to show you, for the record, People's Number 2.

MR. CURTIN: (Showing photograph to Mr. Moran)

Q (By Mr. Curtin) And I ask you, Lieutenant Sullivan, if you can show his Honor on this photograph where you observed these events from—as depicted in that photograph.

THE COURT: That's all right. You can sit down.

A I parked back in this station—

THE COURT: Do you want to see this, Mr. Moran?  
That would be indicating—

THE WITNESS: I'm facing west.

THE COURT: It would be the north end of the macadam.

THE WITNESS: Yes. The station would be situated here, there's the building here, and I'm setting back here facing this driveway.

THE COURT: Facing west.

THE WITNESS: Facing west.

MR. CURTIN: And—

THE WITNESS: And—

MR. CURTIN: Go ahead, sir.

THE WITNESS: I'm sorry. Agent Armenta came South on 23rd Street right in front of me, and Frank Green would have been walking on the west side of the [fol. 144] street down here. (Indicating) He went across the street to this parking lot on the west side of the Jack Newell store. Agent Armenta went across the street, walked along the front of the store to the corner of the store and then came back to a bus stop bench right here. (Indicating)

Q (By Mr. Curtin) And then tell us what you observed next after you saw Mr. Green go to the parking lot and Mr. Armenta do as you just described.

A Agent Groom and I were sitting in the car together at this time, and when Frank Green reached the parking lot we were discussing getting—the possibility of getting a better view of the lot, and we noticed a two-story apartment house directly across the street from where we were parked. Agent Groom decided that this would probably be a better vantage point, and went to this unit on a second story porch, open porch, on that building.

Q And did you see Agent Groom do this? A Yes.

Q And from where you were sitting, could you see Mr. Green and Mr. Armenta?

A Yes.

Q And tell us then what you observed those three persons doing as you were watching them.

A Well, Agent Groom was standing on the second floor deck. Agent Armenta was standing at the bus stop with

his foot resting on the bench, and Frank Green was standing on the edge of the parking lot.

[fol. 145] Q Were there any persons around Mr. Green at this time?

A No.

Q Then tell us what occurred next.

A Within a few minutes, received a radio call from Agent Yates that a man known as Joe Cooper had left his house and was traveling toward Jack Newell's lot.

Q And Mr. Sullivan, had you had occasion to know or meet Mr. Joe Cooper before that date, the 21st of December, or to see him before that date?

A I had seen him about two weeks prior to that date.

Q And had you seen that person in a vehicle prior to the 21st of December, 1961?

A Yes.

Q Then tell us what you observed next after you received this message or communication from Agent Yates?

A This '57 Oldsmobile pulled into the Jack Newell's lot. Frank Green walked over to the car, sat in on the passenger's side in front, and was there a few minutes and walked back coming toward 23rd Street.

Q Did you recognize the car that you saw come into the lot?

A Yes, sir.

Q And how many persons did you see in the car when it came into the lot?

A One person.

Q Did you have occasion to recognize the person in that car, Lieutenant Sullivan?

[fol. 146] A It appeared to me to be Joe Cooper.

Q Then after you saw Mr. Green do as you have described, what did you observe next?

A Mr. Green walked to 23rd and north on 23rd Street. Agent Armenta followed him a short distance behind, and Agent Groom came down off the second floor deck and followed in behind Mr. Green.

Q Then tell us what you did next, Lieutenant Sullivan?

A I pulled out of the service station parking area, went north on 23rd Street to Virginia, turned right, down

about half a block and pulled into a driveway, came back to Virginia and paused there for several minutes.

Q Who was there, sir?

A I saw Frank Green turn west on Virginia, Agent Groom following him. When I saw this turn, I went on—west on Virginia and parked across from Agent Lee. And about this time Armenta came up. I was informed that the buy had gone down all right, for Agent Groom came back over to my car, and we left there.

Q Then where did you go from there, Lieutenant Sullivan?

A We made a U-turn at 22nd—south 22nd and Virginia, went east to 23rd Street, south to Portrero, and then west on Portrero to South 22nd Street, coming around to Jack Newell's parking lot from the back side or the south side.

Q And what did you see there, if anything, sir?

A As we approached there, Mr. Cooper was just pull- [fol. 147] ing out of the lot. He turned north on 22nd Street from the lot, then went east on Cutting Boulevard. I was a short distance behind. And at South 26th Mr. Cooper made a left turn going north and stopped just outside of the intersection.

Q Now, this person that you said was Mr. Cooper pulling out of the lot in this car, was this the same car and person that you had seen Mr. Green come in contact with in the parking lot?

A Yes.

Q Lieutenant Sullivan, did you see Mr. Green talk to or contact any other person other than the persons you've told us about from the time you saw Mr. Green on South 23rd, on the west side of the street and go to the lot and return to the car with Agent Lee.

A No, sir.

Q The only person you saw him contact was Joe Cooper, is that right, sir?

A That's right.

MR. CURTIN: That's all of this witness, Your Honor.

THE COURT: Cross examination, Mr. Moran.



## CROSS EXAMINATION

BY MR. MORAN: Q Lieutenant Sullivan, did you make some notes recording these various events that you have described?

A No, sir, I didn't.

Q Did you dictate a report covering these various events?

A No, sir.

[fol. 148] Q Have you used any written material to refresh your recollection of these events that happened last December?

A I used the—Agent Groom's copy of the State report.

Q Would that be the typewritten form called Arrest Report and Detailed Case Report?

A Yes, sir.

Q Now, had you furnished Mr. Groom at an earlier time the results of your surveillance, what you had seen and the times and where you had gone and so forth.

A No, I wasn't—I didn't feel it was necessary.

Q Now, in looking over this case report—When did you do that, by the way?

A I looked at it yesterday.

Q Did you find anything reflected in there as having been reported by you.

A Whether this is a semantic thing—"Reported," if it includes discussing the case, this would be true.

Q Well, is there anything in the detailed case report which quotes you as having reported certain facts?

A Not quoting me, no.

Q Well, does it outline or state in any way what you saw on this 21st day of December.

A May I see the report, please.

Q Surely. (Handing)

A (Examining) This reports in a general way the facts regarding that incident.

[fol. 149] Q All right. But it doesn't purport to state—Well, I'll withdraw that.

On page five of the detailed case report there is a portion which is described as testimony of witnesses, is there not?

A That's right.

Q And in it, it summarizes what these various witnesses can testify to. Agent Groom, Agent Armenta, Agent Lee, Officer Stumpf, and Agent Yates, Officer Leuker, Richmond criminologist Reeves. Isn't that correct?

A That's right.

Q Now, there's nothing in that summary as to what you personally could testify to.

A No, there isn't.

Q Nor does there appear to be such a summary for your testimony in any other portion of the report.

A (Examining report). Details of the case here—  
(Handing)

MR. CURTIN: For the record, could we have the page number?

MR. MORAN: Page three, details of case.

MR. CURTIN: Thank you.

Q (By Mr. Moran) Now, you don't claim to be familiar personally with all of the facts set forth in details of case, do you?

A (No response)

Q Well, for instance—

[fol. 150] A I—I certainly can't testify to something that I didn't see or be involved in myself.

Q Now, for instance, you don't know what Officer Stumpf and Agent Yates were doing down on South 20th Street, for instance.

A I know why—

THE COURT: Personally.

Q (By Mr. Moran) Personal knowledge.

A I have no personal knowledge. I don't know.

Q You don't know what Agent Groom observed as he stood up on this porch from your personal knowledge.

A No, sir.

Q You don't know what Agent Armenta observed from standing in front of—by the bus stop, do you?

A No.

Q You were driving a Richmond Police car, were you?

A No, sir.

Q Whatever car it was, you were driving it.

A That's right.

Q And was it a car assigned to Agent Groom?

A Assigned to Agent Groom, yes, sir.

Q And you mentioned going to 11th and Nevin, and you observed a phone call being made. Now, present at that time, in that immediate area, were you and Groom, Armenta and Green, and Yates and somebody else—Yates and Stumpf?

A No, Yates and Stumpf weren't there.

[fol. 151] Q I see. They were not in that area.

A (Shaking head)

Q All right.

THE COURT: Your answer was no?

THE WITNESS: Yes, sir.

THE COURT: Don't shake your head.

THE WITNESS: I'm sorry.

Q (By Mr. Moran) After Green went over to the— And I'm jumping. I'm sorry.

Going back to the surveillance or cover at 23rd and Cutting and in that area, after Green got to the parking lot, Mr. Groom then left and walked over to the apartment house porch, did he not?

A That's right.

Q And that's on—that's an apartment house that faces on the next street, 22nd.

A No, sir.

Q What does it face on?

A The part I am looking at, the large side of the building, faces south—faces Cutting, and I don't know what address it would run on.

Q I see. You didn't have occasion to go around and check on 22nd Street to see—

A Not for an address.

Q And was your car, as it was parked in the service station, about in a line with the—let's say the southerly [fol. 152] boundary of that apartment house where Agent Groom was standing?

A No, sir. It's—

Q Would it be south of that or north of it?

A As I recall, it was a short distance south.

Q About how far?

A Well, anything I'd say would be an estimate. The lines drawn parallel might be thirty-five or forty feet.

Q But you essentially, as you looked west you could see Groom.

A Yes, sir.

Q Up on the porch. Now then, you observed Green toward the front end of the parking lot and Armenta nearby.

A Yes, sir.

Q And then when—Let me see the picture—

MR. MORAN: Here it is here.

Q (By Mr. Moran) Showing you People's Exhibit Number 2, about where was Mr. Armenta in this photograph?

A In this picture there's a man standing right at the end of this bus stop bench. Mr. Armenta spent most of his time right here.

Q Right near that bus stop bench. A Yes.

Q And where was Mr. Green?

A Mr. Green would have been in this vicinity right here.

THE COURT: Right at the end of the store.

THE WITNESS: Right at the end of the store.

Q (By Mr. Moran) And right near the sidewalk bordering Cutting—This is Cutting?

A This is Cutting Boulevard, yes. It's some area close to the sidewalk, yes, sir.

Q Within five or six feet. Is that correct?

A I wouldn't pin it to five or six feet. It's a very, very short distance.

Q May I make a mark here. See that little circle? Is that generally the point you indicated?

A It was generally in this vicinity.

Q The point I circled.

A In this vicinity right from here.

THE COURT: Suppose you draw a line over, Mr. Moran, and mark that S-1 so the record will show.

A You realize the perspective here. We're talking about the flat area.

Q (By Mr. Moran) Yes. I'm not trying to—

A In my line of site here, he would be generally in that vicinity.

Q And did he remain generally in that vicinity?

A Generally in that vicinity.

Q And when the defendant parked, did he park generally in that vicinity?



A No, sir.

Q Where did he park?

A He parked a short distance west in the same lot we're talking about.

[fol. 154] Q I see. Would that be in that area where the cars are facing the street?

A Might be somewhere in this area here. (Indicating)

THE COURT: Keep your voice up.

THE WITNESS: Excuse me.

A It would be somewhere in this vicinity right here. (Marking) It would be west of—

MR. MORAN: May that be marked—

A There are two—I think two lines of parking spaces marked there and this would be in the vicinity of the end of the second line south of the sidewalk area. This lot is marked. That would be at the western extremity of the middle parking areas.

Q (By Mr. Moran) The western extremity over toward 22nd Street.

A Yes, sir.

Q I see.

A It's rather difficult with this picture to get the proper perspective.

MR. MORAN: (Marking)

THE COURT: S-2.

Q (By Mr. Moran) Now, the first line of parked cars I think that you mentioned would be the ones closest to Cutting. You said there were two lines. One line was close to Cutting—

A I didn't say there were two lines of parked cars. [fol. 155] I'm talking about parking places.

Q Parking places. I see. And the second line of parking places would be immediately behind that.

A Yes, sir.

Q Now, the parking places nearest to Cutting, are they—at right angles to Cutting or are they angled in some other manner?

A They are angled. As I recall they angle toward 23rd Street.

Q I see. And—

THE COURT: This is not a herring bone type thing where you have two parking against each other.

THE WITNESS: As I recall, they are a herring bone type parking area. However, at this time, whether Mr. Cooper parked in a stall, I don't know. There were no other cars to confuse the issue at that time.

Q (By Mr. Moran) No other cars in the parking lot at all.

A Oh, no, there were other cars there, but as I say, this was open to view for me and—

Q You had an open view of it. A Yes, sir.

Q And what part of the car was facing you as you observed it from the service station? The front, rear, the left side or right side?

A It would be slightly angled toward 23rd Street, side view of the car. It would be about—

Q Well, what side?

A It would be the right-hand side from the driver.

[fol. 156] Q The passenger side that would be. A Yes, sir.

Q So when Green got into the car, you could see him get in on the passenger side?

A That's right.

Q Did he close the door?

A I don't think he did. I don't know whether the door—

Q He sat there I think you mentioned for a couple minutes.

A Yes, sir.

Q Was the door open?

A I'm not positive whether the door was closed or open at this time.

Q And how long did he sit there, about?

A I'd estimate a couple minutes. This would be purely an estimation of the time.

Q How far were you from this car you've described as Cooper's, from your vantage point?

A In my estimation it would be a hundred seventy-five to two hundred feet.

THE COURT: I think we'll take our noon recess, gentlemen. We'll take recess until 1:30 this afternoon.

(Noon recess taken)

[fol. 157]

## AFTERNOON SESSION

1:30 o'clock p.m.

THE COURT: Let the record show that the defendant is present in court with his counsel.

Mr. Sullivan, will you resume the stand.

(Witness resumed stand)

THE COURT: Proceed, Mr. Moran.

MR. MORAN: Would you read the last question and answer, please, Mr. Reporter.

(Record read by Reporter)

Q (By Mr. Moran) You've never measured that distance.

A Never have, sir.

Q Now, Mr. Groom, from his vantage point on this porch was almost directly north of where Green was in the parking lot, isn't that true?

A I believe it would be approximately due north.

Q Whereas you and your—from where you were parked in your automobile at the service station over to where Mr. Groom was on the porch would be some two hundred, two hundred fifty feet, would it not?

A Probably that distance.

Q So it would appear, in any event, that so far as feet is concerned, Mr. Groom was closer to Mr. Green while he was in the parking lot than you were.

A I can't say exactly what distances are there, but I had the feeling it was roughly a triangle situation. I couldn't estimate his distance in comparison to mine too [fol. 158] well.

Q All right. I believe you mentioned, too, seeing Mr. Cooper on some prior occasion.

A Yes, sir.

Q And how long before the 21st of December was that?

A Approximately two weeks.

Q And do you have any notes or records concerning the details of this occasion when you saw him?

A No, I don't.

Q That was the first time you had seen him.

A Yes, sir.

Q Where was that, generally? What area?

A This was on Macdonald Avenue in Richmond.

Q Were you with Mr. Groom and Mr. Armenta?

A I don't believe I was.

Q Were you in your car? A Yes, sir.

Q Was Cooper in a car? A Yes, sir.

Q Were the cars moving?

A I was parked and he was moving.

Q Was it at night? A It was in the evening, yes, sir.

Q And what direction was your car parked? Or what direction was it facing as it was parked?

A At the time I saw him?

Q Yes.

A I was facing west on Macdonald Avenue.

[fol. 159] Q And in what direction was Cooper's car proceeding?

A He drove by me going west and then drove again going east.

Q The same evening? A The same evening.

Q Was he wearing a hat or a cap? A No, sir.

Q Was he wearing a hat or a cap on the day you saw him on December 21st?

A No, sir.

Q Did you see him immediately after he was arrested?

A No, sir.

Q Have you seen him any time after December 21st?

A I saw him the next day, I believe.

Q Did you notice that on his property list that a hat was listed?

A No, sir, I didn't.

Q Now, Mr. Groom didn't feel that the vantage point from the automobile at the Standard station was a very good vantage point, did he?

A This is a matter of opinion.

Q Yes. At least, he expressed that as his opinion, did he not?

A No, not to me.



Q I see. Didn't you tell us that while you were sitting there in the car you had a discussion and that he felt that it was important that he get to a higher elevation in order to have a better vantage point?

A He expressed the opinion that the—this other van-[fol. 160] tage point would be a good vantage point to cover from.

Q And not better.

A I don't remember him saying it was better.

Q You continued to sit in this car at the service station all of the time that Green was in the parking lot.

A Yes, sir.

Q And from the sitting position your eye level would be below the roof level of your car, of course.

A Certainly.

Q And it would be below the roof level of the cars going by on the street and in the parking lot of the market, would it not?

A Yes, sir.

Q Any cars that would pass between you and Green would cut him off of your view, would they not?

A Momentarily, yes sir.

Q And any cars that were parked between you and where this car you've described as Cooper's car, that would cut off your view, would it not?

A Parked in certain areas the possibly could, yes.

Q Did you ever make a note or a record showing that your view of Green was continuously unobstructed during the time that you were parked in the service station?

A No, sir, I didn't.

Q Did you ever tell that to Agent Groom, that your view was completely unobstructed all of the time that [fol. 161] Green was over in the parking lot.

A Did I tell him that it was always completely unobstructed.

Q Yes.

A I said that I saw Green at all times when he was in this lot.

Q At all times. A Yes.

Q All right. Did you make a note of the license number of this Oldsmobile automobile?

A No, sir.

Q Do you know how many Oldsmobile of that type and color there are in Richmond.

A I have no idea, sir.

Q Now, you testified, Lieutenant Sullivan, that when Green contacted the defendant, he approached the defendant's car on the right side, opened the door and got in the passenger's seat.

A Yes, sir.

Q Isn't that true? And that he sat there for a couple of minutes.

A That's right.

Q It was your recollection you were a little unsure, but you thought the door was closed.

A I—I believe I said that I wasn't sure whether it was closed or not.

Q All right. Were you aware that Agent Groom testified that Mr. Green never got in this car of Cooper's, [fol. 162] and that he stood not at the right side but at the left side immediately next to the driver's seat?

A You mean am I aware now or was I aware at the time I testified?

Q Are you aware now.

A I'm aware now, yes.

MR. MORAN: That's all.

THE COURT: Any redirect, Mr. Curtin?

MR. CURTIN: No redirect of this witness, Your Honor.

THE COURT: All right, you may step down.

MR. CURTIN: We'll call Mrs. Gulley.

### LEONA GULLEY,

called as a witness on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE COURT: What is your full name, please?

THE WITNESS: Leona Gulley.

THE COURT: Would you just take the witness chair, Mrs. Gulley, please. Is that G-u-l-l-e-y?

THE WITNESS: Right.

THE COURT: Thank you.

## DIRECT EXAMINATION

BY MR. CURTIN: Q And for the record, Mrs. Gulley, what is your address, please?

A 536 South 20th, Richmond.

Q And that's in the County of Contra Costa, State of California?

[fol. 163] A Right.

Q And do you know the defendant in this matter, Mr. Joe Cooper?

A Yes.

Q And is he present here in court? A He is.

Q Will you point him out to his Honor?

A Over there. (Indicating)

MR. CURTIN: May the record show the witness has identified the defendant, Your Honor.

THE COURT: Yes, it may.

Q (By Mr. Curtin) Mrs. Gulley, is Mr. Cooper related to you in any way?

A Yes.

Q Will you tell his Honor, the Court, what the relationship is?

A He's my nephew.

Q And Mrs. Gulley, did you know where Mr. Cooper lived on or about the 21st of December, 1961?

A Yes. He lived at my house.

Q And about how long did he live there at your house?

A Let me see—I can't think—I think he got out—let me see—April or May, one. He'd been living there since '61, ever since.

Q April or May of 1961? A I think so.

Q Until the 21st of December, 1961. A Yes, uh-huh.

Q Do you have a telephone at your house? A Yes.  
[fol. 164] Q What is the number of your telephone?

A Beacon 2-1879.

Q And did Mr. Cooper have an automobile while living at your house?

A No, he didn't have an automobile, no.

Q Did he drive a car?

A Yes, he drove mine some and he drove this other one some.

Q And what cars did he drive, Mrs. Gulley?

A I let him drove mine when it was something wrong with it. I had him help me fix mine, so he drove mine then, some. And he drove Charles Barber's some.

Q Charles Barber's car? A Yes.

Q What kind of a car was that, Mrs. Gulley?

A Oldsmobile.

Q And what year?

A I think it's a '58, I reckon—'57 or something—'56 or something. I don't know. I can't recall.

Q Is that a 1957 Oldsmobile?

A I can't recall. I'm afraid to say what model.

Q And what color was that car?

A Oh—It was a blue or green or something—pale color. I just know it when I see it.

Q Could it have been a light blue, Mrs. Gulley?

A I don't know whether you call that a light blue or what.

MR. CURTIN: That's all of this witness, Your Honor.

[fol. 165]

### CROSS EXAMINATION

BY MR. MORAN: Q It was a light color, in any event.

A Yes, it was a light color, but I don't know exactly what color.

Q Now, the residence at this address is owned by you, is it not?

A Yes, uh-huh.

Q And the phone number is listed in your name.

A Right.

Q Not listed in Mr. Cooper's.

A No, it's been in my name ever since 1948.

MR. MORAN: That's all that I have. Thank you.

MR. CURTIN: Just one on redirect.

### REDIRECT EXAMINATION

BY MR. CURTIN: Q Mrs. Gulley, on that phone number, have you had occasions to take messages for Mr. Cooper while he was living there?

A No, I never taken a message for Mr. Cooper.



Q Did you answer the phone and call him to the phone?

A Yes, I have answered the phone and I have told him. But it would be girls.

Q And he would be called to the phone.

A Yes, his girl would call him.

Q Was one of his girls Edna Faye Carr?

A Sometimes she would talk to him. Because she didn't have no phone.

[fol. 166] MR. CURTIN: That's all, Your Honor.

The witness may be excused?

MR. MORAN: I don't intend to call Mrs. Gulley. And if she would like, I would have no objection to her sitting in the courtroom.

MR. CURTIN: I have nothing further.

MR. MORAN: With her friend. You didn't subpoena—

MR. CURTIN: I subpoenaed her, but I have no objection if she wishes to—

MR. MORAN: If you wish to sit in here as a spectator with your friend—

THE WITNESS: Thank you.

MR. CURTIN: On reflection, Your Honor, on the basis that there might be possible rebuttal for calling Mrs. Gulley, I would ask that she continue to be excluded from the courtroom.

THE COURT: All right.

Mrs. Gulley, you will have to remain outside the courtroom unless you're called back. I'm sorry.

MR. CURTIN: However, the People do not request that she remain present; if we would need her, Your Honor we can subpoena her by sending a subpoena. So if she doesn't wish to remain, she—

THE COURT: Well, suppose—She's left the courtroom. You can tell her that she can leave, if you want.

[fol. 167] Call your next witness.

MR. CURTIN: We'll call Mr. Lee.

**JOHN LEE,**

called as a witness on behalf of the People, having been first duly sworn, was examined and testified as follows:

**THE CLERK:** What is your full name, please?

**THE WITNESS:** John Lee. That's L-e-e.

**THE COURT:** Just take the witness chair, Mr. Lee.

**DIRECT EXAMINATION**

**BY MR. CURTIN:** Q Mr. Lee, what is your business or occupation?

A United States Treasury Agent, Bureau of Narcotics.

Q And your address, for the record, please?

A 144 Federal Office Building, San Francisco, California.

Q And Mr. Lee, were you so engaged and so employed on December 21st, 1961?

A I was, sir.

Q And Mr. Lee, did you have occasion to be in the Richmond area in the City of Richmond, the County of Contra Costa, on that date?

A Yes, sir, I was.

Q And will you tell us, Mr. Lee, who you were with on that day?

A Agent Yates of our bureau, Agent Groom, Agent Armenta, of the State Bureau of Narcotics, and Officers of the Richmond Police Department.

[fol. 168] Q And was there some other person present with those officers that you have just mentioned?

A Yes, sir, there was.

Q And who was that, sir?

A A person by the name of Frank Green.

Q And where was that that he was in your presence?

A In the vice room of the Richmond Police Department.

Q And what did you observe there that was done in regards to Mr. Green, if anything, sir?

A Mr. Green was searched by Agent Groom. The search consisted of searching his pockets, on the belt—the waistline, the cuffs of the pants. And I believe that was about it.

Q And then after this was done, sir, tell us what happened next, what you did next?

A Agent Armenta of the State Bureau of Narcotics and myself, in company with Mr. Green, got in a 1959 green Mercury, which is a government vehicle, and drove to the vicinity of Nevin Street between 11th and 12th Streets in the City of Richmond.

Q And what did you observe there, sir?

A I parked the government vehicle on Nevin Street, at which time Agent Armenta and Mr. Green got out of the government vehicle onto the sidewalk.

Q And then tell us what you observed next, Mr. Lee?

A Then Agent Armenta and Mr. Green went to a public telephone booth.

[fol. 169] Q And what did you see there, if anything, sir?

A It appeared to me that Mr. Green was placing a telephone call.

Q And was—Did you see anyone else with him?

A Yes, Agent Armenta was there.

Q Did you observe anything else at this time, sir?

A I believe Agent Groom, with one of the detectives from the Richmond Police Department, parked directly across the street from where I was parked.

Q Then after you observed these things, tell us what you observed next, sir.

A Agent Armenta and Mr. Green then returned to where I was parked and entered the car, at which time we followed Agent Groom out to the vicinity of 23rd and Virginia Street in the City of Richmond.

Q And then tell us what happened there, sir?

A On 23rd, as we were approaching Virginia Street, I pulled over to the curb, and Mr. Green was told to get out on the sidewalk. And keeping him in view, I went to Virginia Street, made a right turn into Virginia Street, at which time Agent Armenta got out of the government vehicle.

Q And then tell us what you observed next or what you did next.

A I then parked the government vehicle on Virginia Street between 22nd and 23rd Streets and waited there.

Q And Mr. Lee, then tell us what happened next after that?

[fol. 170] A Then we left at 1:00—I believe approximately 1:05 p.m. I observed Mr. Green coming around the corner from 23rd onto Virginia Street and got into the government vehicle in the back seat.

Q Did you observe any other persons at this time?

A At that particular time? No, sir.

Q And then following that, tell us what happened next?

A At that time I asked Mr. Green if he had the stuff, at which time he said yes and he handed me a brown paper packet.

Q And I will show you, for the record, People's Number 4, and ask you, sir, if you can identify any of those objects for his Honor, the Court.

A Yes, sir, I can.

Q Will you tell his Honor what you can identify and how you are identifying it, sir.

A This brown paper which is part of, I believe, a paper sack, was the brown object that I testified that Mr. Green handed to me. Contained—or wrapped around the brown paper were the two white with blue rule paper bindles. I can identify the three objects here by my initials JYL and the date, 12/21/61, on all three objects.

MR. CURTIN: And for the record, Your Honor, the witness is testifying as to the smaller piece of brown paper and not to the larger piece.

THE COURT: Yes.

Q (By Mr. Curtin) Now, sir, how long have you [fol. 171] been a member of the Federal Bureau of Narcotics, Mr. Lee?

A A little over four years.

Q And when you received those paper bindles, what did they appear to you to be?

A I opened one of the white paper bindles, and in it were contained a white powdery substance.

Q Mr. Lee, the bindles that you are testifying that you identified there, and that you put your initials on, are they ordinarily the type of containers in which narcotics are put and transported by persons?

A Yes, sir, it is.



Q And from what you observed, are they ordinarily wrapped in that manner, as you are holding there in your hand.

A Are you talking about the two white bindles?

Q Yes, the two white paper bindles.

A Yes, sir, it is.

Q And after Mr. Green returned and handed these to you, then tell his Honor what happened next.

A Then approximately thirty seconds later I observed Agent Armenta of the State Bureau of Narcotics come around the corner from 23rd Street onto Virginia Street. Then he also got in the government vehicle. Then at that time Mr. Armenta, myself, and Mr. Green, then returned to the office of the vice squad of the Richmond Police Department.

Q Did you see any other persons prior to returning to the police department as you have so told us?

[fol. 172] A The only other person I believe I saw at that time was Agent Groom.

Q And where was he, sir?

A I believe he was at the intersection of 23rd and Virginia Street.

Q And what was he doing? Was he in a vehicle?

A When I first saw him he was standing there. Then he got in a vehicle.

Q Did you see who else was in the vehicle with Agent Groom, if anyone?

A No, sir, I didn't.

Q Then when you returned to the police department, tell us what you did there, Mr. Lee.

A I maintained custody of the evidence until such time as Agent Groom returned to the vice squad office, at which time I handed the brown paper with the two white paper bindles in it to Agent Groom.

Q And you delivered it to him, then, up in the Hall of Justice, sir?

A Yes, sir.

Q Approximately how long was this after you had obtained them on Virginia Street in the City of Richmond?

A I believe that was approximately at 1:30 p.m.

Q Now, Mr. Lee, did you have occasion to see or meet the defendant in this matter, Joe Cooper?

A Yes, sir, I did.

[fol. 173] Q And can you tell us when that was, sir?

A That was on the same date, the 21st of December, 1961, at the intersection of 7th and Macdonald Street in the City of Richmond, approximately at 3:45 p.m.

Q And will you tell us where you were when you saw him there, sir?

A I'm not too familiar as to the directions in the City of Richmond. I was standing at the intersection of 7th and Macdonald Street on the opposite side—that would be on the—I believe the west side.

Q And then tell us what you observed there, Mr. Lee.

A Approximately at 3:45 p.m., I observed Mr. Cooper in the company of a female and two children walking on Macdonald Street toward 7th, cross the street and approach, I believe, a 1957 blue Oldsmobile.

Q And then tell us what you saw next, sir?

A At that time I observed Agent Groom and Agent Yates both come out of the—out of a store which is located right at that intersection. I believe Agent Groom came out of one door and Agent Yates came out another door. Then both of them approached Defendant Cooper.

Q Then what happened next, sir, that you observed.

A About that time I also crossed the street, and when I reached the area where Mr. Cooper, Agent Groom and Agent Yates were at, they all three were facing toward the car. And I heard Mr. Cooper say, "It's under the [fol. 174] sun visor." And Agent Yates asked him, "What's under the sun visor?" He stated, "Marijuana." About that time he was bending over looking into the vehicle pointing with—I believe it was his right hand. Then all of a sudden I believe Agent Groom had his hands on the Defendant Cooper's left hand, and all I could see at that time was both the defendant's hand with Agent Groom's hand going toward the mouth.

Q Did you hear anything after that, sir?

A Yes, I heard Agent Groom yelling to let go of his finger.

Q And tell us what you observed next after hearing that.

A At that time—I got his right hand back with the assistance of one of the police officers whose name I don't recall at this time. Then I believe Agent Yates got the defendant's left hand, at which time the handcuffs were placed on the defendant's hands.

Q Did you have occasion to observe Agent Groom?

A Yes. I believe it was anywhere from fifteen to twenty seconds Agent Groom was telling the defendant to let go of his finger.

Q And did you see his finger after this time, sir?

A Yes, sir, I did.

Q What did you observe about it that was unusual, if anything?

A The skin was torn and it was bleeding.

THE COURT: For the record, sir, again, as I understand it you have placed your initials on the two bindles and on the small brown paper.

[fol. 175] THE WITNESS: Yes, sir, I did.

MR. CURTIN: That's all with this witness, Your Honor.

### CROSS EXAMINATION

BY MR. MORAN: Q Mr. Lee, have you described all of your activities at the time this arrest took place?

A Yes, sir.

Q Did you find it was necessary to take some other measures to subdue this Mr. Cooper?

A All I did was have his right hand in the back of him.

Q All you did. A Yes, sir.

Q You know what a Judo chop is?

A I believe I do, yes, sir.

Q Did you administer any of those to the back of his person?

A No, sir, I did not.

Q Did anybody else in your presence?

A In my presence, if anyone did I did not see it, sir.

Q Now, I believe you mentioned that Mr. Cooper was pointing up at this visor with his right hand.

A Yes, sir.

Q At that time nobody had ahold of his right hand.

A Not to my knowledge, no, sir.

Q I believe you mentioned that the search of Green consisted of looking in his pockets? What were they, turned inside out?

A Yes, sir.

Q Did he have a coat on? A I believe he did.  
[fol. 176] Q He had a hat on?

A He had a cap type hat.

Q All right. And how about the pockets of his shirt? Somebody looked at those?

A I think Agent Groom did.

Q Groom had everything to do with this search, I mean, nobody else did.

A That's right.

Q Did he remove the man's clothes, Mr. Green's clothes?

A You mean strip him?

Q Yes. A No, sir, he did not.

Q Well, did he have him remove his shirt?

A No, sir.

Q Did he have him remove his trousers? A No, sir.

Q His shoes? A No, sir.

Q His socks? A No, sir.

Q He checked, you say, around the beltline.

A His waistline.

Q I'm sorry. A His waistline.

Q Waistline. How did he do that? What did that consist of?

A Just sticking his thumbs in and going around.

Q I see. And then he looked in the cuff of his trousers.

A Yes, sir.

Q Now, is that the extent of it?

A That's about it, sir.

Q Now, is there some test—When you handed this [fol. 177] over to Mr. Groom, these bindles, was there some, let's say, preliminary examination that you and Mr. Groom made of it? A light test, is it, or—

A No. Mr. Groom made a Mockey reagent test in my presence.

Q What kind of a test?

A Mockey reagent.



Q How do you make that test?

A It comes in a little vial which right in the center has a striation that you can break in half. And in there is a solution of acid. I believe—I'm not positive, but I believe it's nitric acid. But putting any substance that is a derivative of opium, the color will change to a purplish color.

Q And that's what happened with this—

A Yes, sir.

Q Now, you say this is a white powdery substance.

A You mean the powder that was—

Q The bindles. A Yes, sir.

Q People's Exhibit Number 4. A Yes, sir.

Q And you formed an opinion at least at the time they were turned over to you by Mr. Green and while you were still at 22nd and Virginia, that this was in all likelihood heroin.

A In my opinion, yes, sir.

Q And you gave a signal indicating that to Mr. Groom, a signal of some kind, did you not, that you had scored two bindles or you had gotten two bindles, or something?

[fol. 178] A I'm not too positive—To the best of my recollection, I think after Agent Groom got in his vehicle he drove up to where we were parked and at that time I believe I told him that we did have the two bindles.

Q By that time you had looked at it and seen that it was a white powdery substance.

A Yes, sir.

Q You're sure about it being white. A Yes, sir.

Q You made some report? You have some notes concerning your activities in this case?

A No, sir, I do not.

Q You don't have any? You didn't make any?

A No, sir, I did not.

Q Never at any time. A No, sir.

Q When you got through with your investigation on this matter, you didn't dictate a report.

A Dictate to a secretary, you mean, sir?

Q I don't care whether you dictate to a secretary or to a machine. You know what I'm talking about when I say dictation?

A The only information I relayed was to Agent Groom as to the time and place, as to what had happened.

Q Well, where did you do that?

A At the Vice office at the Richmond Police Department.

Q And who did you relay that to? A Agent Groom.

Q You made no separate record for the Bureau of Narcotics?

[fol. 179] A No, sir, I did not.

Q That is, of the Federal Bureau of Narcotics.

A No, sir, I did not.

Q Actually, what you found in this package was a brown powdery substance, was it not?

A No, sir, it was a white powdery substance.

Q You recall testifying before the Grand Jury of this county in January of this year.

A Yes, sir, I did.

Q And I'll refer you to page 23, starting with line 12, and going down to line 30, and ask you if you will read that to yourself. (Handing)

A (Examining)

Q I'll ask you, Mr. Lee, if it's not correct that you were asked these questions and gave these answers on that occasion:

**QUESTION:** Will you tell us what you received from Mr. Green that you observed.

**ANSWER:** I received two paper bindles, I believe, at the time—I believe at that time it was wrapped in a brown paper which apparently was torn from a brown paper package that you receive when you go to a grocery store.

**QUESTION:** And did you examine the contents of the bindles, sir?

**ANSWER:** No. Not at that time, no, sir.

**QUESTION:** Did you do so at a later time?

**ANSWER:** Yes, sir.

[fol. 180] **QUESTION:** What did it appear to be?

**ANSWER:** It appeared to be a brown powdery substance.

**QUESTION:** Mr. Lee, what did you do with the two bindles that you received from Mr. Green?

"ANSWER: I placed my initials JYL on both the bindles and also on the brown wrapping paper, and at that time I turned the two paper bindles and also the brown paper over to State Agent Howard Groom."

Do you recall being asked those questions and giving those answers?

Yes. If I stated brown powdery substance at that time, then I made a mistake.

Q Well, it was fresher in your mind then than it is now, wasn't it, sir?

A Yes.

Q This was less than a month after the occurrence?

A I believe it was.

MR. MORAN: That's all.

MR. CURTIN: Nothing further.

THE COURT: The witness may be excused?

MR. CURTIN: This witness, Your Honor, may be excused.

Mr. Reeves.

MR. MORAN: Oh pardon me. I did have something else of Mr. Lee. I wonder—

THE COURT: Just a minute, Mr. Lee. Would you [fol. 181] return to the witness stand, please.

(Witness resumed stand)

Q (By Mr. Moran) Mr. Lee, after the arrest of Mr. Cooper, and taking him out to the Richmond Police Department, you made a search of his person, did you?

A I did not take Mr. Cooper to the Richmond Police Department.

Q Well, that wasn't my question. I said after you saw him up at the Richmond Police Department after his arrest, did you search him?

A No, sir, I did not.

Q Did you see him searched? A No, sir, I did not.

Q Did you see some money that was taken from his pockets?

A I don't recall seeing any money, no, sir.

Q Don't you recall, Mr. Lee, that you checked the serial numbers of certain bills, a list of bills that were in

your possession against serial numbers of money that he had in his possession, that Cooper had?

A I don't believe I had the list of the money.

Q Who had the list?

A I'm not sure who had the possession of the list.

Q You didn't observe this being done?

A I do not recall it, sir.

Q Mr. Lee, do you recall that sometime that afternoon you ascertained that the marked money furnished by Mr. Groom was not in the defendant's possession?

A I believe that was done later, because I don't— [fol. 182] After the arrest of Cooper, I did not see Agent Groom, because I took him to the emergency hospital and that was the last time I saw Agent Groom.

Q Well, you told us a minute ago that you gave him the bindles that afternoon at the Richmond Police Department.

A I gave him the bindles at 1:30 p.m. that afternoon. But after the arrest of Cooper, Agent Groom was not present at the police department.

Q All right. But you were present at the police department after Cooper was arrested, were you not?

A Yes, I was.

Q Do you recall telling Mr. Cooper at that time that you were finished with the case and that he was to be released as far as you were concerned?

A No, sir, I did not.

Q Did Mr. Yates tell him that?

A I think you better ask Mr. Yates.

Q Well, were you there?

A I was there part of the time, yes.

Q And you didn't hear Mr. Yates tell him that?

A No, sir.

Q Isn't it true, Mr. Lee, that you decided the moment that no money could be found in his possession, none of the marked money, that your case was closed, and that you told Cooper that you were through with him, that he could go.

A That is not true.



[fol. 183] Q Do you have any record made by you as to what was said that afternoon to Mr. Cooper after his arrest?

A No, sir, I do not.

Q Who all was present in the room back up at the police station after Cooper was arrested that afternoon?

A There was Agent Yates and the police officers and myself and I believe Agent Armenta of the State Bureau of Narcotics.

Q One of the police officers was Sergeant Billingsley.

A I believe it was, yes.

Q Do you remember any others from the Richmond Police Department?

A There was one other officer there which I don't recall his name. I believe he's outside now.

Q Isn't it true that at that time, and as soon they found that this marked money was not in the possession of Mr. Cooper, that all of the officers present, with the exception of Sergeant Billingsley, said, "Turn him loose; we don't have a case."

A No, sir, that's not true.

Q And isn't it true that at that same time Billingsley, Sergeant Billingsley, said, "I'm going to hold him as a parole violator."

A No, sir, I don't recollect that.

Q You don't recollect that. A No, sir.

Q Do you recollect that that's wrong or was not said?

A Well, if he made that statement, I don't recollect.

[fol. 184] Q Anyway, you left. A Yes.

Q Shortly after they checked the money. Did you not?

A Yes, sir.

Q And Yates left.

A I don't know what time he left. I left before he did.

Q Yates didn't go with you. A No, sir.

Q When you left, though, all the other officers were still there.

A I believe they were, sir.

MR. MORAN: That's all.

MR. CURTIN: Nothing further.

THE COURT: The witness may be excused now, gentlemen?

MR. CURTIN: Yes.

MR. MORAN: I wonder, while we're waiting for Reeves, if we could get some measurements from Mr. Groom, if he was able to get any.

MR. CURTIN: I have no objection.

THE COURT: Go ahead. You're already under oath.

MR. GROOM: I called the Richmond Police Department and talked to the technician Ludke, and he went down and made the measurements and called back that the measurement as you requested, from the southerly edge of the four-plex that shows in one of the People's exhibits, to the first driveway south of Cutting on 22nd, the first driveway of the Newell's parking lot, was 337 feet.

[fol. 185] MR. MORAN: Three thirty-seven.

MR. GROOM: Right.

MR. MORAN: Before Mr. Reeves comes in, may I ask one other question, and that's concerning the date of this detailed police report.

Were you able to find out the date that that—

MR. GROOM: I neglected to even check it, sir.

MR. MORAN: All right.

THE COURT: Well, what's your best recollection on when you dictated that report? From the date of the occurrence.

MR. GROOM: It would have been—

THE COURT: Two days or a week or two weeks.

MR. GROOM: It would have been either—I'm trying to recollect now. To the best of my recollection, I don't recollect. It must have been the following Monday, because that particular Friday I was involved in other work and so Monday I assume that I dictated the report.

MR. MORAN: Perhaps this will help: You recall that the photographs of your fingers, which are People's Number 6-A and 6-B, were taken on December 29th.

MR. GROOM: Yes.

MR. MORAN: At 4:05 p.m.

MR. GROOM: Yes, sir.

MR. MORAN: And you will recall, I believe, that in this report, detailed case report—and I'm referring to

[fol. 186] page 1-B—that of the exhibits attached, exhibit three was a photograph taken by the Richmond Police Department of your finger.

MR. GROOM: Yes, sir.

MR. MORAN: Would that help to establish the date?

MR. GROOM: No, sir.

MR. MORAN: But in any event, whenever it was, it was dictated or written after the photograph of your finger was taken.

MR. GROOM: Not after that photograph.

MR. MORAN: What?

MR. GROOM: Not after that photograph.

MR. MORAN: You mean another photograph taken earlier?

MR. GROOM: Yes.

MR. MORAN: Where is that one? Have you seen that?

MR. GROOM: The District Attorney has it.

MR. MORAN: While he's looking for that—

MR. CURTIN: I have that, Counsel—

MR. MORAN: On the day that Cooper was arrested, all of the papers were taken out of his glove compartment, were they not, and transported to the vice office of the Richmond Police Department?

MR. GROOM: I don't know.

MR. MORAN: You don't know.

MR. CURTIN: May the record show I am handing a photograph to Mr. Moran dated 12/22/61, with the stamp [fol. 187] on the back.

MR. MORAN: So you had two sets of photographs taken of your hand.

MR. GROOM: Yes.

MR. MORAN: The first one didn't suit you.

MR. GROOM: Didn't suit the District Attorney.

MR. MORAN: What?

MR. GROOM: Didn't suit the District Attorney.

MR. MORAN: You're not suing him for damages, I hope.

That's all.

THE COURT: Do you have any questions?

MR. CURTIN: No questions.

We'll call Mr. Reeves.

**HILLARD M. REEVES,**

called as a witness on behalf of the People, having been first duly sworn, was examined and testified as follows:

**THE CLERK:** What is your full name, please?

**THE WITNESS:** Hillard M. Reeves.

**DIRECT EXAMINATION**

**BY MR. CURTIN:** Q Mr. Reeves, what is your address, please, for the record?

A 2433 Downer Avenue, Richmond.

Q And what is your business or occupation, sir?

A I'm the criminalist for the Richmond Police Department, sir.

Q And Mr. Reeves, what is your training and background for that position?

[fol. 188] A I'm a graduate of the University of California in criminology; I have worked for the Richmond Police Department for a little over twelve and a half years. A little over ten and a half years of that have been in the crime lab.

Q And have you had experience in regards to narcotics, in particular heroin and marijuana?

A Yes, I have.

Q And have you had chemical training in that regard, sir?

A Yes, I have.

Q And have you testified in Superior Court as an expert in the analyzation of those two substances?

A Yes, I have.

Q Now, Mr. Reeves, were you employed as the criminalist for the Richmond Police Department on December the 22nd, 1961?

A Yes, I was.

Q Did you have occasion to see Mr. Groom, a State Agent for the Bureau of Narcotics on that day?

A Yes, I did.

Q And did he on that day have occasion to give you anything, if he did?

A Yes.

**MR. CURTIN:** People's Number 4, Counsel.



Q (By Mr. Curtin) I'll show you this envelope marked People's Number 4 for identification and ask you if you can identify anything that Agent Groom gave you on that day, sir? (Handing)  
[fol. 189] A (Examining) Yes, I can.

Q Will you tell us what you can identify and how you can do that.

A He gave me a small piece of brown paper, apparently from a grocery bag, and wrapped in—it was wrapped around two papers of white powder. He also gave me this envelope, which contains these.

Q And where did he give you those items, sir?

A In the crime lab at the Richmond Police Department.

Q And how do you identify them, sir?

A I have my mark on them. And on the envelope I have information as to who gave the material to me.

Q And looking at the contents, sir, do you have your mark on the two white paper bindles in People's Number 4?

A Yes, I have.

Q Do you have your mark on the other pieces of paper contained in there?

A Yes, I have.

Q On two other pieces of paper, sir? A Yes.

Q And did you then mark the envelope that you hold in your hand?

A Yes, I did.

Q And that is your writing on that envelope, sir?

A Under the laboratory section, it is my writing, yes, sir.

Q Now Mr. Reeves, after receiving those items, did you open the two white paper bindles?

[fol. 190] A Yes, I did.

Q And did you have occasion to see any substance when you opened them?

A Yes, I did.

Q Did you have occasion to analyze that substance?

A Yes.

Q By chemical analyzation, sir? A Yes, sir.

Q And what did you analyze the substance in the two white paper bindles to be?

A The white powder in each of the two bindles contained heroin.

Q And that is the narcotic substance defined in the Health and Safety Code of the State of California.

A Yes, sir, it is.

Q After you analyzed those substances, sir, in the two paper bindles, what did you do with those items that Agent Groom had given to you?

A I locked them up in an evidence locker that I have in the crime lab.

Q And who has access to that locker, sir?

A Just myself, sir.

Q Did you have occasion to remove People's Number 4, the envelope and its contents from that locker?

A Yes, I did.

Q Did you have custody of those items up until today, sir, after you were handed them—after they were handed to you by Agent Groom?

[fol. 191] A Yes. Not up until today. There were two periods that they have been out of my possession: one was during the Grand Jury hearing and the other was when I gave it to you yesterday.

Q You handed it to me yesterday in open court, is that correct?

A Yes, sir.

Q Except for those occasions, then, that item, the brown Manila envelope and the object it contains have been in your custody.

A Yes, sir.

MR. CURTIN: At this time, Your Honor, we offer these in evidence as People's Exhibit Number 4.

MR. MORAN: If the Court please, I'm going to object. They were out of this officer's custody for a period and no explanation or proof has been brought in as to who handled them, what was done with them at the Grand Jury investigation.

THE COURT: Well, there's at least a presumption that they were in custody of the foreman or secretary of the Grand Jury. There is at least a presumption the clerk of this performed a duty and has kept them. The objection will be overruled.

What was that, number four?

MR. CURTIN: Number four, Your Honor.

THE COURT: All right. People's Number 4 for identification will be received in evidence and marked [fol. 192] People's Number 4 in evidence.

(Whereupon the object above referred to, having been previously marked People's Exhibit No. 4 for identification, was received in evidence.)

Q (By Mr. Curtin) Mr. Reeves, did Mr. Groom have occasion to hand you any other item at a time later than December the 21st, 1961?

A Yes, sir, he did.

Q And what was it that he handed to you at a later time, sir?

A He gave me a Bureau of Narcotics Enforcement envelope containing one seed.

MR. CURTIN: Referring, Counsel, to People's Number 7.

Q (By Mr. Curtin) I'll show you this envelope marked for identification as People's Number 7, and ask you if you can identify that. (Handing)

A (Examining) Yes, sir, I can.

MR. MORAN: May I see it for a moment? I just want to see how big the seed is. (Examining exhibit)

Thank you.

MR. CURTIN: For the record, Mr. Reeves, when was it that Mr. Groom, the State Agent, handed you the seed and the envelope about which you have just told us.

THE WITNESS: 3:30 p.m. on the 4th of April, sir.

MR. CURTIN: That's of this year?

THE WITNESS: Yes, sir.

MR. CURTIN: Where was that, sir?

[fol. 193] THE WITNESS: In the crime lab of the Richmond Police Department.

Q (By Mr. Curtin) Did you have occasion to examine the seed about which you have told us?

A Yes, I did.

Q Will you tell us what you found it to be?

A I found it to be a seed of Cannabis sativa, more commonly known as marijuana.

MR. CURTIN: Your Honor, at this time we would offer that in evidence for the probative value it has as to knowledge of the defendant and as to identity.

THE COURT: People's Number 7 for identification will be received in evidence and marked People's Number 7 in evidence.

(Whereupon the object above referred to, having been previously marked People's Exhibit No. 7 for identification, was received in evidence.)

Q (By Mr. Curtin) That last item, Mr. Reeves, did you keep it in your custody at the Richmond Police Department?

A Yes, I did.

Q Did you bring that to court with you yesterday, sir?

A Yes, I did.

Q And you handed it to me in open court. A Yes, sir.

Q It's been in your custody ever since that time.

A Yes, sir.

Q Of April the 4th. A Yes, sir.

[fol. 194] MR. CURTIN: That's all of this witness, Your Honor.

THE COURT: All right.

### CROSS EXAMINATION.

BY MR. MORAN: Q Mr. Reeves, did you determine how much heroin was in the two bindles that you have described?

A No, sir, I did not.

Q There is some notation under laboratory report there. Is this one paper 1050G and—What is the meaning or significance of the 1050G?

A This is to indicate that the powder in the paper weighed—in the case of number one, 1050 grams.

Q I see.

A And the white powder in paper number two weighed 1426 grams.

Q And is that a usual or common way of indicating the amount of powders found in bindles of this type?



A The amount of powder, yes, sir.

Q And is it used by the State Bureau of Narcotics?

A Yes, sir.

Q Just using the smaller letter "g."

A I'm not sure that they use the small letter "g." They may write the word grams out.

Q It's not unusual, though, to use "g" for grams, is it?

A It's common practice. That's what I do all the time, sir.

Q Now, I take it that you did not make any determination of how much of this powder was heroin.

A No, sir, I did not.

[fol. 195] Q There is a test to determine that, is there not?

A Yes, it can be determined quantitatively.

Q Had you any reason to believe that this was not all heroin?

A No, sir.

Q Can you perform that test in your laboratory as to determining what part is heroin and what part is something else?

A Yes, sir, I could.

Q How long would it take?

A Not having had occasion to do this, I couldn't tell you, sir.

Q Where is it usually done?

A Where is it usually done?

Q Yes, in this area where would that type of test ordinarily be made?

A I've never been asked to do it, and I don't know whether the Bureau of Narcotic Enforcement Laboratory does it or not. Probably they do.

Q Where is that located?

A That's in San Francisco, sir.

Q Mr. Groom has never asked to secure these bindles in order to make such a test.

A No, sir.

Q From your study of chemistry and—as related to narcotics—would the swallowing of heroin in the amount that you have indicated here have any ill effect on a person?

MR. CURTIN: Your Honor, for the record, then, I [fol. 196] will object to this question. This is calling for medical opinion and expert testimony. And Mr. Reeves has not so qualified himself.

THE COURT: I'll permit you to ask him some questions on voir dire to find out if he is qualified.

MR. CURTIN: All right, Your Honor.

THE COURT: Do you feel qualified to answer a question of the effect of taking this orally?

THE WITNESS: No, sir, I do not.

THE COURT: Well, I guess the objection would be good.

Q (By Mr. Moran) When these various—these bindles were taken out at the time of the Grand Jury investigation, to whom did you transport them? I'm referring to People's Exhibit 4.

A To the Deputy District Attorney who was handling the hearing. I don't remember who it was now, sir.

Q And was it returned to you by the same deputy?

A It was returned to me at the hearing.

Q At the hearing itself. A Yes, sir.

Q And you testified there, did you not?

A Yes, sir, I did.

Q So it was only out of your possession for a short time.

A Yes, sir.

MR. MORAN: That's all.

### REDIRECT EXAMINATION

BY MR. CURTIN: Q To refresh your memory, sir, you remember it was me that you handed it to at the [fol. 197] time of the Grand Jury hearing, if you remember.

A No, sir, I don't remember.

Q All right.

A Because there have been several hearings and different ones of you have handled it.

Q And it was returned to your custody in the presence of the Grand Jury during the hearing, is that not correct, sir?

A Yes, sir, it was.

Q And it was so ordered to be returned to you by the foreman of the Grand Jury.

A That's right.

THE COURT: Well, so the record won't show that we're all being facetious, the transcript does show that you appeared.

MR. MORAN: That was my recollection.

MR. CURTIN: Thank you.

THE COURT: The witness may be excused?

MR. CURTIN: He may be excused.

Call Mr. Stumpf.

### LOUIS STUMPF

called as a witness on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: What is your full name, please?

THE WITNESS: Louis Stumpf.

THE COURT: L-o-u-i-s?

THE WITNESS: Yes, sir.

### [fol. 198] DIRECT EXAMINATION

BY MR. CURTIN: Q What is your address, for the record, sir?

A 164-17th Street, Richmond.

Q And Mr. Stumpf, what is your business or occupation?

A Police officer, City of Richmond.

Q That's for the City of Richmond, County of Contra

Costa—

A Yes, sir.

Q —State of California. And Mr. Stumpf, were you so employed on the 21st day of December, 1961?

A I was.

Q What division or department were you working for in the Richmond Police Department on that day, sir?

A Vice detail.

Q And did you have occasion to be with some fellow officers or other agents on that day during an investigation?

A I was.

Q With whom were you, sir?

A I was with Agent Groom, Agent Armenta from the State Bureau of Narcotics, Agent Lee, and Agent Yates of the Federal Bureau of Narcotics. And Agent Billingsley from the vice detail, and Lieutenant Sullivan.

Q At the time you were with those gentlemen, was there someone else present?

A Yes.

Q Who was that, sir? A Frank Green.

Q And after this time, sir, will you tell us what you [fol. 199] did after you saw those other officers and Mr. Frank Green.

A I was in a State car with Agent Yates, and we were parked at South 19th and Cutting.

Q Approximately what time was this on December the 21st, 1961?

A We arrived at 19th and Cutting about 12:30.

Q Was this in the afternoon, sir, of that day?

A Yes.

Q And which direction or where did you stop at that location, South 19th and Cutting?

A Just north of Cutting facing Cutting on 19th Street.

Q And had you had occasion prior to that time to see or observe the defendant in this matter, Mr. Joe Cooper?

A Prior to that date?

Q Yes. A Yes.

Q And did you know him when you saw him?

A I did.

And from where you were parked at South 19th and Cutting, what could you observe from there, sir? Just describe the area.

A It's a residential and business area through there. On the northwest corner of South 19th and Cutting is a Union service station. The other corners are vacant.

MR. CURTIN: May the record show at this time, Your Honor, I'm showing to Mr. Moran a photograph for his examination. (Handing)

[fol. 200] MR. MORAN: (Examining)

Q (By Mr. Curtin) Mr. Stumpf, I'm going to show you this photograph that defense counsel has seen and



ask you if you can tell his Honor what that scene depicts.  
(Handing)

A (Examining) It shows the east side of South 19th and Cutting and the intersection of 20th and Cutting.

MR. MORAN: Intersection of 20th—

THE WITNESS: South 20th and Cutting.

Q (By Mr. Curtin) When you stationed yourself there, sir, did you—or were you able to have communication with anyone other than the persons in your vehicle?

A Yes, sir.

Q How, sir? A By radio.

Q And could you observe from where you were sitting at that location, the address 536 South 20th Street in the City of Richmond?

A Yes, sir, I could.

Q And is that house or location depicted in that photograph?

A It is.

Q And is it a fair representation of the area of South 19th and Cutting, looking to 536 South 20th in the City of Richmond?

A Yes, sir.

Q Will you hold it up and point out to his Honor where 536 South 20th is as shown in that photograph?

A (Indicating)

[fol. 201] THE COURT: Perhaps you'd better have that marked, Mr. Curtin.

MR. CURTIN: Yes, we'll offer it in evidence at this time.

THE COURT: I mean you better mark it so the record will show—

MR. CURTIN: I see.

Q (By Mr. Curtin) Would you please take a pen and mark that for his Honor, the Court, drawing a line from the house, 536 20th. And make a S-1.

MR. CURTIN: We'll offer that in evidence, Your Honor.

THE COURT: It will be received in evidence and marked People's Exhibit Number 8.

(Whereupon the photograph above referred to was received in evidence and marked People's Exhibit No. 8.)

MR. CURTIN: May the record show, Your Honor, I am showing another photograph to Mr. Moran. (Handing)

MR. MORAN: (Examining)

Q (By Mr. Curtin) I'll show you this photograph which has just been shown to Mr. Moran and ask you to tell his Honor, the Court, what that photograph depicts.

A South 20th and Cutting? That's what it looks like.

Q Can you tell us in which— Is that in the City of Richmond, County of Contra Costa, State of California?

A Yes, sir.

Q Which direction is that photograph taken at that location?

[fol. 202] A Pointing east—southeast.

Q And is it looking toward what street, sir?

A Looking toward South 20th.

Q And can you see on that photograph the location of Newell's Market in the City of Richmond at South 23rd and Cutting?

A Yes, sir.

Q And will you point that out to his Honor and then mark it for his Honor, the Court.

THE COURT: You mean Newell's Market.

MR. CURTIN: Newell's Market, Your Honor.

THE WITNESS: (Marking)

MR. CURTIN: We'll offer that as People's Number 9.

THE COURT: It will be received in evidence and marked People's Number 9 in evidence.

(Whereupon the photograph above referred to was received in evidence and marked People's Exhibit No. 9.)

Q (By Mr. Curtin). Now, Mr. Stumpf, referring back to People's Number 8, I believe you told us you were at this scene approximately 12:30 p.m. in the afternoon of December 21st, 1961.

A Yes, sir.

Q And did you have occasion to see any vehicles in or near or around 536 South 20th Street in the City of Richmond?

A Yes, sir.

Q And Mr. Stumpf, what vehicle did you observe there?

A I saw a 1957 blue Oldsmobile parked on South [fol. 203] 19th Street, headed north in front of 536—South 20th, rather.

Q It was parked on South 20th. A Yes.

Q And Mr. Stumpf, had you had occasion to ever see that car before that day in question?

A Yes, sir.

Q Had you had occasion to see a person driving that car prior to that day in question?

A Yes, sir.

Q Did you have occasion to send any message or communication regarding that vehicle after arriving on the scene there at South 19th and Cutting.

A I didn't personally.

Q Did you hear of some message being sent, sir?

A I know of no message that was sent.

Q Was there somebody with you, sir? A No.

Q In your vehicle.

A Oh, at the time you're talking about?

Q Yes. When you arrived at the scene, who did you go there with?

A Oh, Agent Yates.

Q Of the Federal Bureau of Narcotics? A Yes, sir.

Q And then after you were there and you saw the vehicle, tell us what you observed next.

A At approximately ten minutes to 1:00, we saw a person that fit the description of Mr. Cooper come out of the house and walk to the car parked in front, the '57 Oldsmobile, and he stood at the rear end of the car [fol. 204] for approximately two to three minutes, appeared to do something with the trunk, had the trunk lid up, and then he sat—went and sat in the car for about another minute, and I saw him driving north to Cutting and make a right turn on Cutting and go east, make a right turn on 22nd Street—South 22nd Street, and disappeared from view at that time.

Q After you observed this, Mr. Stumpf, what did you do?

A We radioed this information to the other cars that heard our radio.

Q And then what did you do next, sir?

A We drove onto Cutting and east on Cutting to 23rd and Cutting.

Q And where did you go there, sir?

A Made a left turn.

Q Onto what street? A Onto South 23rd.

Q And then came in what direction on South 23rd?

A Came—went north on South 23rd.

Q Who was driving your vehicle, Mr. Stumpf? A I was.

Q And who was with you, if anyone, at this time?

A Agent Yates.

Q And where was he in your car?

A The front seat, passenger's seat.

Q Did you have occasion to see this automobile at any time later that day?

A Yes, sir.

[fol. 205] Q Where was that, Mr. Stumpf?

A At 7th and Macdonald.

Q And will you tell us approximately when it was that you saw it at 7th and Macdonald later that day?

A It was about 2:15 p.m.

Q And did you observe anyone in the car?

A At the time we saw the car, no.

Q What did you do when you saw it at that location?

A We waited.

Q Can you tell his Honor approximately how long you waited?

A Until 3:30 p.m.

Q And then tell us what you observed, sir.

A At about approximately 3:30 p.m. we observed Mr. Cooper and the lady and two small children walk up to the car.

Q Then what happened then, sir?

A Mr. Cooper took a key and was unlocking—appeared to be unlocking the door. And he was approached by Agent Groom and Agent Yates.

Q What happened next, Mr. Stumpf?

A I was—I and Agent Billingsley and Agent Lee approached the car and as we approached—a scuffle had started and I and Sergeant Billingsley assisted in handcuffing Mr. Cooper at the car.



Q Could you hear anything being said at this time?

A I heard— As I approached the car, I heard Mr. Cooper say that the marijuana was under the visor in the car.

[fol. 206] Q Did you hear— A And—

Q I'm sorry, sir.

A Then the scuffling began and I heard Agent Groom telling Cooper to let go of his finger, that he was biting his finger.

Q And for the record, Mr. Stumpf, do you see Mr. Cooper present here in court?

A I do.

Q Will you point him out to his Honor.

A Sitting at the other end of the table.

MR. CURTIN: May the record show the witness has identified the defendant.

THE COURT: Yes, it may.

MR. CURTIN: That's all of this witness, Your Honor.

### CROSS EXAMINATION

BY MR. MORAN: Q You've described the situation at the time of Mr. Cooper's arrest as a scuffle. I think one of the other officers called it a great to-do. Whatever it was, before the arrest was over Mr. Cooper was bleeding in and about the forehead, the nose, both lips, was he not?

A I remember seeing blood on his face, yes.

Q What caused it?

A It was my thoughts that it was the blood from Groom's finger.

Q You really thought that. A Yes.

Q Well, you found out later up at the police department that he was cut, did you not?

[fol. 207] A I don't know.

Q Didn't you go back up to the vice room?

A I was up in the vice office, yes.

Q You didn't see the cut and scratches on his face?

A I saw blood on his face.

Q And he told you and the other officers that all of his teeth had been knocked loose?

A I remember him saying his teeth were loose.

Q And he was spitting blood?

A Didn't see him spitting blood.

Q Down at the scene of the arrest.

A I didn't see any spitting going on.

Q And do you recall that one of the officers took Cooper's handkerchief out of his pocket so that he could hold it up in the area of his mouth to stop the flow of blood?

A Right after he was handcuffed, I left with Mrs. Edna Faye Carr, and had no more to do at the scene with Mr. Cooper.

Q Well now, you don't know, then, is that it?

A So I don't know what happened with Mr. Cooper.

Q You didn't see him bleeding. A No.

Q Didn't see the handkerchief put up to his mouth.

A No.

Q You didn't strike him. A No.

Q Nobody struck him in your presence. A No.

Q How many times had you seen Cooper prior to this December 21st?

[fol. 208] A Well, I remember specifically one date, the 5th of December.

Q At night, I take it?

A That was about 6:00 o'clock in the evening, yes.

Q Well, at that time of the year it's dark, is it not?

A It was—Yes, it was dark.

Q He was going by in a car, was he? A Yes.

Q That's the only time you remember seeing him?

A I had seen him on another occasion. I don't know if it was after that date or before, but that was at 6th and Macdonald.

Q At night. A At night.

Q When you first saw him on December the 21st, he was in front of his house?

A Yes.

Q And that's on— And how many blocks away were you?

A It would be one block to Cutting and then from there to South 19th it would be two blocks. It would be two blocks away.

Q Were you right at the intersection of Cutting?

A Yes.

Q And you could make him out and you could identify him two blocks away.

A He looked like Mr. Cooper, the same build— I could not identify his face at that distance. He looked— He had the same build, the same—he limped.

[fol. 209] Q You could see all that.

A I could see that much, yes, sir.

Q Two blocks away. You didn't seem quite certain as to whether—when he was standing at the back of his car whether he looked in the trunk or was doing something else. Could you see clearly what he was doing?

A No.

Q Did you make any separate record of your activity on this day, write or record or keep notes?

A As I remember, I made the arrest report.

Q For Richmond.

A For Richmoind. Also I believe I made the offense report. That's my part of the report.

MR. MORAN: I believe that's all I have.

THE COURT: Any redirect?

MR. CURTIN: Just for the record, Your Honor.

### REDIRECT EXAMINATION

BY MR. CURTIN: Q May I ask you this: You said that you could identify Mr. Cooper from one thing—or among one thing was that he limped.

A Yes, sir.

Q What knowledge did you have about the fact that he limped?

A I had received information that he had been in an auto accident or had his legs broke.

Q And when you saw him on the 5th of December, '61, when he was going by in a car, tell his Honor what [fol. 210] you saw at that time. What did you observe him doing?

A On the 5th of December?

Q Yes.

A I saw him driving west on Macdonald Avenue. I was parked at— I was inside an auto at 5th and Mac-

donald. I saw him stop between 4th and 5th. I saw a person get in his car. He drove to 4th and Macdonald. He parked. And I saw the same person get out of the car, walk back to a cafe at 5th and Macdonald. In approximately five to ten minutes he walked back to Mr. Cooper's car at 4th and Macdonald. And I don't— Mr. Cooper left, but I don't remember just how he left, which way he went at that time.

Q Then Mr. Cooper on that day was in that area for some length of time, is that correct?

A That's correct.

Q And did you know the person that you saw get into the car and get out on those occasions?

A I did.

MR. CURTIN: That's all of this witness.

MR. MORAN: Pardon me just a minute.

THE COURT: Any recross—

MR. MORAN: I believe that's all. The witness may be excused.

THE COURT: You may be excused.

MR. MORAN: Mr. Stumpf, just a minute while you're going there. Is this house at 536 South 20th [fol. 211] white stucco? It appears to be in the picture.

THE WITNESS: It has brown or brickwork, as I remember, some kind, in front. It's white.

MR. CURTIN: We'll call Mr. Yates as our next witness.

THE COURT: It's 3:00 o'clock, Mr. Curtin. Suppose we take our afternoon recess.

(Recess taken)

(After recess)

THE COURT: Let the record show that the defendant is present in court with his counsel.

Call your next witness.

MR. CURTIN: Mr. Yates.

WALTER T. YATES,

called as a witness on behalf of the People, having been first duly sworn, was examined and testified as follows:



THE CLERK: What is your full name?

THE WITNESS: Walter T. Yates, Y-a-t-e-s.

THE COURT: Just take the witness chair, Mr. Yates.

### DIRECT EXAMINATION

BY MR. CURTIN: Q Mr. Yates, what is your address, for the record, please.

A Room 144, the Federal Building, San Francisco.

Q And what is your business or occupation, sir?

A Agent, Federal Bureau of Narcotics.

Q And approximately how long have you been so employed?

[fol. 212] A Approximately two and a half years.

Q And Mr. Yates, do you recall the events of the 21st day of December, 1961?

A Yes, sir.

Q Did you have occasion to be in the City of Richmond, County of Contra Costa, on that day, sir?

A Yes, sir.

Q With whom were you on that day?

A At various times with Agent Lee, Groom, Armenta, local officers Sullivan, Billingsley and Stout.

Q And approximately what time was this, Mr. Yates, on that day?

A I believe I arrived at approximately 10:30 or 11:00 o'clock in the morning.

Q And then did you have occasion to see some other person when you were with the officers that you just named?

A Yes, sir.

Q Who was that, sir?

A Fellow by the name of Green. I don't recall his first name.

Q And did you have occasion, then, after observing this person, leave the Richmond Police Department?

A Yes, sir.

Q And for the record, you were there, is that correct, sir when you saw these people?

A Yes, sir.

Q And with whom did you go, if anyone, when you left there?

[fol. 213] A Officer Stout and I left together.

Q And approximately what time of day was this, sir?

A It was approximately 12:30.

Q And where did you and the officer that you mentioned go to?

A We went to 19th Street where we parked.

Q And near what street, sir, was that?

A Cutting—I believe it was Cutting Boulevard.

Q And is that location in the City of Richmond, County of Contra Costa?

A Yes, sir.

Q I show you People's Number 8, Mr. Yates, and ask you if you can tell us if that looks like the area where you were.

A Yes, sir, it is.

Q And who was driving the vehicle that you were in, sir?

A Officer Stout.

Q And for the record, is that Stout or Stumpf?

A Possibly Stumpf.

Q Stumpf. A I thought it was Stout.

Q And Mr. Yates, will you tell us what you did when you arrived at this area as depicted in People's Number 8?

A We parked on 19th Street facing toward Cutting Boulevard where we were able to look at an angle over to the left over toward 20th Street.

Q And did you see any vehicles over on 20th Street, sir?

A Yes, sir.

Q And is that, by the way, for the record, South 20th [fol. 214] Street in the City of Richmond?

A Yes, sir.

Q And what kind of a vehicle if any did you see over on South 20th?

A I recall, I believe, there were several vehicles; the one specifically was a blue Oldsmobile parked over there in front of one of the houses.

Q Were you watching this vehicle, sir? A Yes, sir.

Q And then tell us what you observed if anything that occurred in or near this vehicle while you were watching.

A Approximately 12:50 p.m. we observed a large male subject come out of the second house, which would be the second house south of Cutting there, and go to that blue Oldsmobile. Eventually he went to the trunk of the car and was doing something there for an estimated five or ten minutes.

Q Then tell us what you observed this person do next?

A The person then got in the vehicle—I guess that would be north. He went toward Cutting Boulevard away from the house, turned right onto Cutting, which I believe is west. I'm not too familiar with the area there. Anyway, toward 23rd Street. And then we saw him turn right and then he went out of our view.

Q Now sir, when you saw this person that you describe in the car, did you give any communication or any message to anyone, if you did so?

[fol. 215] A Yes, sir.

Q How did you do that?

A With a radio in the car. There was another radio car involved in the incident.

Q On arriving at the scene and observing this vehicle, did you give any radio message or communication?

A Yes, sir. We notified the other officers that the car in question was at the scene.

Q Then after you observed this person do as you told us, tell us what you did next.

A A short time later, a short time after we had seen the car turn right, an estimated minute or two minutes, we drove out of 19th Street onto Cutting Boulevard where we turned left—again I'm not sure of the direction; I think that's west—toward the direction that he had gone. We went down, then we looked on the right side just before getting to 23rd Street and we saw the car and the male occupant sitting in the parking lot there. There's a market there. I think it's Newell's or something to that effect.

Q Did you see any other person at that time, sir?

A Yes, sir, I saw the same person sitting in the car and the subject Green—at that time he appeared to be just leaving. He was a couple of feet and he was facing toward Cutting Boulevard, the intersection, actually, of Cutting and 23rd.

Q And then the car that you saw Green leaving, this was the same car that you had seen on South 20th, and [fol. 216] the same person that you had seen coming out of the house was in the car, is that correct, sir?

A Yes, sir.

MR. CURTIN: That's all of this witness, Your Honor.

### CROSS EXAMINATION

BY MR. MORAN: Q Now, how did you ascertain that the same person that you saw come out of the house was the same person that you saw in the car at the parking lot.

A The person at 20th Street was a large person wearing—appeared to be wearing a hat and some type of coat, which I don't know if it was a short coat or a long coat. And this same person sitting in the car was a large person wearing a hat and the same type coat.

Q You didn't compare the facial features at one time, let's say coming out of the house, with those that you saw in the parking lot.

A No, sir, I don't—it's my best recollection I didn't actually—couldn't actually see the face at 20th Street.

Q But you did at 20th Street— You were some two blocks away from where this man came out of the house, as I understand you?

A It's approximately a block and a half, I believe. It would be very close to two blocks.

Q And you could see that he was a large man and had this hat on that you mentioned.

A Yes, sir.

[fol. 217] Q Is there anything else unusual about him?

A Other than being large, not that I can recall, no, sir.

Q And he walked out of the house and then walked over by the trunk of this car.

A Yes, sir.

Q You couldn't tell whether he opened it or what he was doing there.

A Well, I believe that we did— I'm not sure now. I seem to recall seeing the trunk go up, but I'm not sure. I believe he did open the trunk.



Q Did he run out of the house or walk rapidly or walk in a normal manner?

A He did not run. As I recall, it would be a fairly normal walk.

Q Had you, previous to December 21st, seen the defendant before?

A Not to my knowledge, no, sir.

Q That was 19th Street you were parked on.

A Yes, sir.

Q And that picture was taken from—from a position on 19th Street looking north. Would that be— Or looking toward Cutting.

A Yes, sir.

Q Did you go any closer to this house in your car at any time, either before or since, to this house on 20th Street that the subject came out of.

[fol. 218] A I was in the area before and I'm not sure—it seems to me like I drove past the house once, but again I'm not sure.

Q Do you remember what construction or color it was?

A Not for sure, no, sir. Seems to me it was a light color, blue or green—something—I'm not sure.

Q A light shade, in any event.

A As I recall. I'm not sure.

Q You saw the defendant later that day, did you not?

A Yes, sir.

Q You placed him under arrest, did you not?

A Yes, sir.

Q Did you know that Mr. Green was furnished with marked money?

A Yes, sir.

Q And did you make any examination of the defendant's money after his arrest to determine if the marked money was among those bills?

A I was present. I can't recall what part I played. Seems to me I was the one who actually examined the money. Perhaps I only looked at the numbers. But I was present.

Q In any event, none of the marked money was found on his person.

A No, sir, none was found.

Q Did you make any attempt to— You believed at that time that this man had received the marked money, I presume.

A Yes, sir.

Q The defendant. A Yes, sir.

[fol. 219] Q Did you make any attempt to either by questioning or in any other way, to trace this marked money?

A Not that I can recall. We asked him about money he had and he said he had some in the car, which we had brought to the station, and I went downstairs and I obtained some money out of the car which he said was there.

Q In the glove compartment. Or I'm asking.

A I believe it was on the visor. I believe it was behind the visor.

Q Certain papers, also, however, were removed from the glove compartment by you.

A I believe there were some papers, yes, sir.

Q And those were taken up to the vice squad room.

A I'm not sure. I believe there possibly was a letter, but I'm not sure.

Q Did you make any search of the automobile?

A Yes, sir.

Q Did you— When the defendant was arrested, he was down in the shopping area of Richmond, was he not, near 7th and Macdonald.

A Yes, sir.

Q And he and Miss Carr and the two children were carrying packages, were they not?

A There was a woman with him; I don't know her last name. And some children.

Q Yes. They were carrying packages.

[fol. 220] A So far as I know, the defendant was not carrying one. I can't recall if the woman was carrying one or not.

Q Well, did you make any attempt to find whether they had been shopping in an effort to locate this marked money?

A No, sir, I didn't.

Q Did you ever ask the defendant—I believe you said you did ask him where he had been.

A I don't believe I did, no, sir.

Q When you determined that the marked money was not in his possession, you also later determined, or about the same time determined that the lady that was with him did not have the money, either.

A I didn't, no, sir.

Q Well, you were advised by one of the other officers that she did not have it.

A I may have been. I don't recall if I was told.

Q But at that point you told the defendant that you were finished with his part of the case, did you not?

A That I was finished with his part of the case?

Q Yes. A Not to my knowledge, no, sir.

Q You did not file any Federal charge. A No, sir.

Q You had been working on this investigation for some time previous to December the 21st, isn't that correct?

A Yes, sir.

Q You never filed any Federal charge. A No, sir.

Q And is it not true that your decision in that regard [fol. 221] was because he did not have the marked money on him.

A No, sir, that is not true.

Q Do you have some report reflecting your activities in this investigation concerning Joe Cooper?

A Only our daily activity report showing that we have been on an investigation. We do not write an official report to our bureau.

Q It showed your various activities.

A Yes, sir, that we were engaged. In other words, daily activities engaged in certain investigations.

Q You kept notes concerning your activities on this case?

A So far as I know, I made no notes regarding the case at that time.

Q You made some telephone transcriptions, did you not?

A Yes, sir.

Q Did you make those personally?

A Would you explain? Do you mean was I present?

Q Yes. A Yes, sir.

Q And were they made by you or at your direction?

A Under my direction or supervision, yes.

Q And where were those— Where were you when those were made?

A At the office of the Federal Bureau of Narcotics in San Francisco.

Q And then they consisted of transcribing certain telephone communications, did they not?

[fol. 222] Q And was that on a line connected with Beacon 2-1879?

A Yes, sir.

Q And where was that interception made?

A In other words, where did we record it?

Q Yes.

A Right in the room in which I sit we have a telephone.

Q I see.

A We attached a coil to the telephone.

Q In other words, somebody at your office placed a call to this Beacon number.

A Yes, sir.

Q And on more than one occasion? A Yes, sir.

Q And over what period of time?

A The first that I know for sure was on December the 7th. There possibly was one before that. But my best recollection was December the 7th was the first one.

Q You were using informants to make calls to Mr. Cooper, were you?

A One, yes, sir.

Q Where did you go after— You mentioned that after you saw this Oldsmobile go down toward Newell's Market, you then drove down Cutting past the market.

A Yes, sir.

Q Now, did you see Mr. Green at that time?

A As we passed the parking lot, yes, sir.

Q And was he sitting in this blue Oldsmobile?

[fol. 223] A No, sir.

Q Was he walking in the parking lot? A Yes, sir.

Q And do you remember which direction?

A Toward the intersection, or actually toward Cutting Boulevard. Cutting and 23rd, as you know, cross. He was angling to some extent toward that intersection. Actually he was going toward Cutting.



Q He was not in or near the defendant's car at that moment.

A He was, yes, sir, near the car.

Q He was what? A Near the car.

Q I see. How far?

A An estimated three or four feet.

Q But facing away from it. A Yes, sir.

Q All right. Now, where did you go after that?

A We drove—I don't know exactly the streets that we went on. We drove around about way and went back to 19th Street.

Q Was it your purpose to have a surveillance of this automobile?

A Yes, sir.

Q And you were in radio communication with Mr. Groom's automobile, were you not, Lieutenant Sullivan and Mr. Groom?

A I don't actually know—remember who was in the other car. But the other State vehicle has a communication with the other State vehicle.

Q All right. So you were engaged in the surveillance, or you intended to be.

[fol. 224] A Yes, sir.

Q Did you follow the defendant's—this car as you described as the defendant's car?

A We went after it, but we did not locate it.

Q You didn't see it at any time after it left the parking lot.

A Yes, sir, I saw it again—

Q Later in the afternoon? A Yes, sir.

Q Down on 7th and Macdonald. A Yes, sir.

Q But between the time you saw it in the parking lot you did not see it again—

A Not so far as I know, no, sir.

Q Who if anybody gave you directions as to where to proceed in connection with this surveillance?

A I believe Lieutenant Sullivan was using the radio. Whoever was using the radio in the other vehicle. I'm not sure, but I vaguely remember Lieutenant Sullivan talking at one time or another. I believe it was he, but I'm not sure.

Q Do you recall if beforehand there was any plan of operation to conduct this surveillance after the exchange of mone was made for narcotics?

A I don't recall any discussion that we were to follow the car, unless it would have been during the transaction. In other words, after we had seen him leave his home and go to the parking lot. I don't recall discussing it before that.

Q I see. But you knew after that that there was to be a surveillance of the car.

[fol. 225] A We were going to attempt one, yes, sir.

Q And were the other officers that you mentioned, were they also to be engaged in the surveillance of this car?

A Yes, sir.

Q And what was the purpose, if you know, of that surveillance?

A Well, actually the original purpose for us to go back to 19th Street to see the car return home. And I believe that was the time the decision was made we would attempt to pick up on it and follow it for a short time.

Q To arrest Mr. Cooper, isn't that the purpose?

A Not at that specific time, no, sir.

Q Well, let's say shortly after he went home.

A No, sir. In fact, as I recall, we discussed, even before we went out, that we would try to make another buy, a second purchase.

Q But during the afternoon you decided not to?

A When he did not return home, yes, sir. We attempted to, but he did not return home.

MR. MORAN: I believe that's all.

MR. CURTIN: One question, Your Honor, on redirect.

### REDIRECT EXAMINATION

BY MR. CURTIN: Q Mr. Yates, you stated that you found money in the defendant's car, and I believe you stated over the visor.

A To my best recollection it was. It was in a billfold or some container behind the visor. It may possibly have [fol. 226] been in the pockets, but my recollection is it was behind the visor.

Q For the record, how much money did you find there, sir, as best you can recall?

A I'm not sure. I believe it was approximately \$55.00.

MR. CURTIN: That's all of this witness, Your Honor.

THE COURT: Anything further, Mr. Moran?

### RECROSS EXAMINATION

BY MR. MORAN: Q You asked the lieutenant where he had gotten that money?

A I probably did. I don't recall.

Q Would it refresh your recollection to ask whether he told you that he had cashed a disability check that day?

A I don't remember him saying that, no, sir.

Q You don't have a recollection one way or the other.

A No, sir.

MR. MORAN: That's all.

MR. CURTIN: One further question, then, on re-direct.

### FURTHER REDIRECT EXAMINATION

BY MR. CURTIN: Q Did you determine that Mr. Cooper was disabled in any way after the arrest, sir?

A I didn't know it, no, sir.

MR. CURTIN: That's all of this witness.

MR. MORAN: Well, these things always lead to another.

### FURTHER RECROSS EXAMINATION

BY MR. MORAN: Q You were the one that at the [fol. 227] time of the arrest, came up behind Mr. Cooper and grabbed him by the left arm?

A I didn't grab him when I walked up to him. It was after I saw his hand go toward his mouth. At that time I did grab his left arm.

Q You didn't wrench—

A Actually I didn't grab a hold of him. I walked up and told him he was under arrest and he just stood there. I possibly placed my hand on his arm, but I did not restrain him because I didn't see there was any purpose to, because he was just standing there.

Q What happened, then, after you told him that?

A I said "You're under arrest." He said, "Okay. It's in there behind the visor." And then I said, "What's in there?" He says, "The marijuana." And he was stooped over, and about that time I was looking in and that's when I saw his hand go—actually it was at his pocket going to his mouth.

Q You didn't see what was in his hand, I take it.

A Not for sure, no, sir. I thought I saw something in his hand, but I wasn't sure.

Q You found out later that he had some breath pills in his pocket?

A I don't remember any, no, sir.

Q You don't remember making a search or the details of the search.

A I searched his pocket, because—I remember that. [fol. 228] I don't remember finding anything in his pocket at that time.

MR. MORAN: That's all I have.

MR. CURTIN: Nothing further.

The witness may be excused.

We'll call Sergeant Billingsley.

#### ORVILLE L. BILLINGSLEY,

called as a witness on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: What is your full name, please?

THE WITNESS: Orville L. Billingsley.

THE COURT: Just take the witness chair, Mr. Billingsley.

#### DIRECT EXAMINATION

BY MR. CURTIN: Q Mr. Billingsley, what is your address, for the record, please?

A 2741 Sheldon Drive, Richmond.

Q And what is your business or occupation, sir?

A I'm a police sergeant, City of Richmond.

Q And to what detail or bureau are you attached to the City of Richmond Police Department?

A Special services.



Q Is that commonly known as the vice squad?

A Yes.

Q Commonly makes investigations regarding narcotics, sir?

A Yes.

Q Were you so attached on December the 21st, 1961? [fol. 229] A I was assigned there on a break-in basis officially on the 1st of January.

Q Were you working with that detail on that day, sir?

A Yes.

Q Did you have occasion to see the defendant in this matter, Mr. Joe Cooper, on that day?

A Yes.

Q And do you see that person present here in court?

A Yes.

Q Would you point him out to his Honor.

A The gentleman at the end of the table.

Q Did you have occasion to see him in the City of Richmond on the day of December the 21st, 1961?

A Yes, sir.

Q And where was it that you saw him, Sergeant?

A At the corner of 7th and Macdonald Avenue.

Q And what was the occasion that you had to be there, sir?

A I was there to help take him into custody.

Q And will you tell us what you observed prior to seeing Mr. Cooper, if you saw anything at that time.

A I saw him two or three strides before he reached the door of his car, the door on the right-hand side.

Q What kind of a car was it, Mr. Billingsley?

A It was an Oldsmobile.

Q Can you tell us the year? A A 1957 model.

Q And then when you saw Mr. Cooper go to his car, [fol. 230] tell us what you observed next.

A At about the instant he reached this door of his car, Agent Groom, State Agent Groom came up to his right-hand side and Federal Agent Yates on his left-hand side. They took a position before I was there. It appeared that they each took his arm, Groom the right arm and Yates the left arm.

Q And then tell us what you observed next, sir?

A Well, within seconds I had reached a position in back of the defendants. The conversation that I first heard when I reached the defendant was that Agent Yates said something to the effect, "Are you holding any narcotics? And the defendant said, "Yes, some marijuana; it's in the car there. It's there by the visor." And he was ducking down in a position as though to look in toward the visor of his car. And Yates went down into the same crouched position to look in the area of the visor, and at about this time there was a sudden movement on the part of the defendant. He wrenched his left hand free from Yates and reached into the area—the left—correction—the right front area of his body into a pocket, a movement from that area toward his mouth. Agent Groom at this point started calling out, "He's eating my finger; he's eating my finger! Let it go! You're eating my finger!" At this same instant I was trying to get ahold of his right arm myself. /

Q And the words that you heard coming from Agent Groom, could you tell the Court how long in time you heard [fol. 231] these remarks from Agent Groom?

A I would estimate it, well, from—possibly twenty-five seconds, twenty to twenty-five seconds.

Q And what did you hear during this period of time?

A Well, Groom was crying out in pain, "You've got my finger. Let it go; let it go. You're eating my finger." And that was about the words I recall repeated over and over.

Q Then tell us what occurred next, sir, after you heard this.

A Well, within the twenty or twenty-five seconds, in some manner Agent Groom freed his finger from the defendant's mouth in a jerking motion. By this time the defendant was pressed against the hood of his car and we were placing cuffs on his hands. I had an arm lock on his right arm at this point, and as I recall Yates and Officer Stumpf in the area of the left arm.

Q Now, Mr. Billingsley, after this occurrence, did you have occasion to be present at a conversation with the defendant, Mr. Cooper?

A Yes.

Q When was this, sir?

A There was a brief conversation at the station the same day, and a second conversation the next day.

Q On the brief conversation on the same day with Mr. Cooper, what was said at that time, sir?

A As best I recall, something about he told Officer Yates and myself that he had some money down in his [fol. 232] car. And I don't recall any specific conversation. That's about all I do recall, that he did tell Officer Yates there was some money down in his car and told him where to find it.

Q Then on the following day, you said there was a further conversation with Mr. Cooper?

A Yes.

Q Was that about the events that had occurred on December 21st, 1961?

A Yes.

Q And was this conversation with Mr. Cooper one that was freely and voluntarily entered into by him in your presence?

A Yes.

Q And there was no coercion used or duress or threats of duress used in any manner.

A No, sir.

Q No promises of immunity were made to him.

A None at all.

Q And what was said on the day following about the events of December 1st, 1961?

A Well, some of the questions I can recall that were asked by Agent Groom, one was if he used heroin, if he knew what heroin looked like, if he ever sold it. His answers to those questions were in the negative. There was conversation about Agent Groom's finger having been bitten on the date of 21, December. He was apologetic about that. Agent Groom asked him what it was he was eating, and he said it was marijuana. Later in the con-[fol. 233] versation after Agent Groom had said something to the effect, "Don't you know you aren't supposed to be holding marijuana?" His answer was—"Maybe it was a breath pill." I asked him a question why would he eat on the agent's finger if this was only some breath pills. There was no direct answer, as I recall, to my question.

Other questions asked of the defendant was, how often did he smoke marijuana. At one time he smoked it quite frequently—

THE COURT: You mean he said that?

THE WITNESS: Yes.

A And then he changed this to state that he hadn't smoked, as best I can recall, since '57. And then I asked the question whether or not this marijuana that he had previously said that he ate, he had carried it for four years. And he said, "Well, no, not rightly so; that was probably those breath pills." This is the best that I can recall of this conversation.

I asked him a question if he had ever unknowingly associated with persons whom he later learned used narcotics. He said yes there was one time a person he got starting getting skinny, and "I suspected he was using it so I dropped him." I asked him what that person's name was. As I recall he said—

MR. MORAN: If the Court please, I'm going to object [fol. 234] to this part as incompetent and irrelevant.

THE COURT: Yes, it will be sustained.

MR. CURTIN: I have no further questions of this witness, Your Honor.

THE COURT: Cross examination, Mr. Moran.

### CROSS EXAMINATION

BY MR. MORAN: Q Sergeant Billingsley, the defendant told you and the officers that day that—the day of this interrogation, which was the day after the accident, I take it —

A Yes.

Q —that his teeth had almost been pulled out.

A Words along those lines, yes, sir.

Q And he said that his nose and lip had been cut.

A As best I can recall on that during the conversation about the finger, he was saying, "You almost pulled my tooth out," or something. And the agent was saying, "I was trying to get my finger out." That's about the best I can recall offhand.

Q And he said that his throat was scratched and swollen.



A It's my recollection he did say something about the throat being sore. I can't recall what the words were. Words along that line, yes.

Q Now, do you have an actual recollection that he told you and the other officers that he smoked marijuana frequently?

A Yes, that, words along that line, yes. And then in [fol. 235] pinning that down, I asked him how many he had smoked on the day of his arrest, and the day before, and he said he had smoked none, and then he said, as I recall, it had been back in '57 he used to smoke marijuana.

Q Do you have a copy of your transcript here?

A I don't, sir, no, sir. I have the tape itself.

Q At the time of the arrest, your watchband was broken?

A Yes, sir.

Q What caused that, if you know?

A I don't know, sir.

Q You accused Cooper of hitting you? A No, sir.

Q Did you hit him? A No, sir.

MR. MORAN: If you can't find that, Mr. Curtin, maybe I can find it.

MR. CURTIN: I'm sorry, Counsel Yes. This is a copy of— I beg your pardon. That's the wrong one.

That's a copy of the transcript I've already furnished to counsel. (Handing)

MR. MORAN: Would you find for me—not read it aloud, but find for me where it appears that he smoked, he told you in effect, that he smoked marijuana frequently.

THE WITNESS: What I had reference to is in the general area of eight—on page seven from about line eight to twenty-three is what I had —

MR. MORAN: Line what, eight?

THE WITNESS: Starting at about the question, line [fol. 236] 8 on page 7.

Q (By Mr. Moran) All right. And the question was, "How much weed do you usually smoke a day?"

"ANSWER: I very seldom get any.

"QUESTION: Pardon?

"ANSWER: Very seldom have any.

"QUESTION: Do you smoke it daily or once or twice a week?

"ANSWER: No.

"About how often do you smoke it?

"Oh, before I left Los Angeles, I used to smoke, but I never smoked much up here. There isn't much up here.

"QUESTION: What does it do to you.

"ANSWER: Nothing but makes you eat a lot.

"QUESTION: Makes it give you an appetite.

"ANSWER: No."

Is that what you had reference to?

A Yes.

Q And he told you in other portions of the conversation that this event down in Los Angeles had been several years ago, did he not?

A Yes, sir.

Q And he was arrested for it down there.

A I believe in answer to a question from Agent Groom he did say he was arrested, yes.

[fol. 237] Q Do you have any record, whether by transcription or in writing, as to what you and the other officers discussed with Mr. Cooper in the Richmond Police Department after his arrest on the 21st of December?

A No, sir. I don't, personally.

Q You didn't make any record of that.

A I don't have any record of it, no, sir.

Q Who all was present that afternoon when he was at the Richmond Police Department?

A On the 21st?

Q Yes.

A Let's see. It was— The Federal agent and I brought the defendant to the station in the office. I believe before he left the office, that Officer Stumpf arrived, for a certainty. As I recall, Officer Stumpf and I took the defendant down to the booking desk.

Q There was a period of time when you and Officer Stumpf were with the defendant, that you were the only law enforcement officers with the defendant.

A It's my recollection—I'm not certain that Officer Stumpf is the officer who accompanied me to the jail. There was some officer. If that was Officer Stumpf, it would have been Officer Stumpf and I alone en route from the office to the booking desk. It was myself and some other officer. I'm not positive who what officer was.

Q You had rather a violent argument with Mr. Cooper [fol. 238] on that time when you and the other officer were alone with him in the Richmond Police Department.

A No, sir.

Q You called him a son-of-a-bitch, did you not?

A No, sir, No cause to.

Q And you complained bitterly about your watchband being broken.

A No, sir. I didn't know my band was broken. One of the officers handed me my watch after the scuffle. I didn't know it had been broken.

Q You told him that you were going to see that he was held in jail whether it had to be for parole violation or whatever, he was going to stay in jail?

A No, sir, no conversation along that line.

Q Officer, you mentioned that as you approached at the time of the arrest, Groom had a hold of his right arm, Yates had a hold of his left arm.

A Yes, sir.

Q And that in going through a maneuver of some kind that he wrenched his left hand free from Yates.

A Yes. When they first took their positions, had the arms, there was no motion at all. The defendant made no motion or as far as I could hear, said nothing, for the first two seconds.

Q During those few seconds, Yates had a hold of his left arm and Agent Groom had a hold of his right arm. [fol. 239] A Yes.

Q And you actually saw him wrench his left arm free from Yates.

A Yes. I was immediately at his back.

Q And you're just as sure of that as everything you have told us today, are you not?

A Yes, sir.

MR. MORAN: That's all.

## REDIRECT EXAMINATION

BY MR. CURTIN: Q Mr. Billingsley, the discussion on the 22nd of December, 1961, with Mr. Cooper, was preserved by mechanical preservation, was it not, sir?

A Yes.

Q And that was what?

A On a recorder, tape.

Q Tape recorder? A Yes.

Q And did you bring that tape with you here to court, sir?

A Yes, sir.

Q And do you have it with you? A Yes, sir.

MR. CURTIN: Your Honor, we would ask that it be marked for identification only.

MR. MORAN: Of course, I would object to it. Now the only part that he's been questioned about on that was this marijuana business. He's had an opportunity to read the record. He said, "That's what I meant." It was read. I would certainly object to go into the balance of it.

[fol. 240] THE COURT: Well, of course, I have no idea what's in it. What usually happens, parts are admissible and parts are not admissible.

Is this a copy of that that you have gone into?

MR. CURTIN: Yes, Your Honor. For the record may I say that I have offered it only for identification so that it will be held for record purposes. I have not offered it in evidence.

MR. MORAN: I appreciate that.

THE COURT: Well, it will be received and marked People's Number 10, is it, for identification only.

MR. CURTIN: Would you hand that—

Officer, better show the defense counsel first, for the record.

THE COURT: Well, if it's not going into evidence, I guess you don't care.

MR. MORAN: I don't care.

THE COURT: If it's marked, it will remain here in the custody of the Clerk, and that's all you want it for.

MR. CURTIN: Yes. The tape is presently mounted on the recorder.



Would you take it off and give that to the Clerk, for the record, to mark.

For the record, Mr. Billingsley, the tape and the box that you are handing to the Clerk, you have identified that as the tape in question, sir?

[fol. 241] THE WITNESS: Yes.

MR. CURTIN: Thank you.

(Whereupon the article above referred to was marked People's Exhibit No. 10 for Identification.)

MR. CURTIN: That's all I have of this witness, Your Honor.

THE COURT: Mr. Moran?

MR. MORAN: That's all.

THE COURT: The officer may be excused?

MR. CURTIN: Yes.

At this time, Your Honor, the People will rest their case.

May I speak to defense counsel, Your Honor?

THE COURT: Yes, you may.

(Mr. Curtin and Mr. Moran conferring)

THE COURT: Call your first witness, Mr. Moran.

MR. MORAN: If the Court please, before doing that, I believe this is a case where I feel that a motion for acquittal is in order.

The circumstances, I believe, are quite strange and unusual. The informant, who is in custody in this county, has not been called to testify. It would appear, as Your Honor well knows, that they were relying heavily on marked money, a situation involving marked money, and—

THE COURT: I just wonder, Mr. Moran, if there is a motion to advise the Jury to acquit, but I don't [fol. 242] know of any motion to dismiss in a criminal case.

MR. MORAN: I was just up there looking at that Penal Code section myself. Although there isn't a code section covering it—I just went up a few minutes ago—there are many cases discussing—

THE COURT: Oh, there isn't any question. If a crime has not been made out—

MR. MORAN: Yes. Whatever the motion may be, perhaps dismissal would be more properly phrased.

I do think, though, that there are serious gaps in the case that's been presented here. I am somewhat appalled by the obvious "pat" story that the officers have come up with, and still that shows so many gaps of the type I've mentioned. I am thinking particularly of the claim that was made before the Grand Jury, and elsewhere, that this Mr. Green was in constant sight of the officers. Armenta then comes in and testifies that during the obviously critical period he was completely out of his sight. Mr. Groom is in the same situation; he's behind the fence and then he's behind a house. There are cars in front of him. He's six feet tall looking out over a series of parked cars some 350 feet away. Mr. Groom—and all this under oath—says the man stood at the driver's side of the car, didn't get in. Lieutenant Sullivan, who has no records on the case and is obviously accepting a recollection that's quite faulty, said no, he got in the car; he went in the left side. [fol. 243] Billingsley said he wrenched his left arm free from Yates. Yates said no, he didn't have hold of it at the time. The marked money situation, I can't quite understand it. If they were going to make another buy, it would appear to me that the—Conceded that marked money would not have been used in the first place, they had four carloads of officers and they can't—they say they can't keep track of this man.

I don't know the defendant; I don't know anything about him. But I feel that this is the type of investigation, the type of error—not calling Green—that seems to me there is something very wrong there; that there's so much reasonable doubt that I don't believe this case should be allowed to proceed further.

MR. CURTIN: Your Honor, the People rely on cases that have stated that a participant in a case such as this is not actually a necessary witness where there are eye witnesses to the transaction.

THE COURT: Well, I don't think I have any right to pass on that. I guess Green is not a high class citizen. I am sure that Mr. Moran doesn't want me to say the District Attorney should or shouldn't put a witness on that they themselves don't have too much confidence in on the witness stand. I think I have to take the case as it's presented to me.

Actually, I see no reason, Mr. Moran, to disbelieve [fol. 244] at this point the basic testimony of the officers. I have no doubt that the defendant was out there. I have no doubt that Green was out there. I have no doubt that the contact was made. The two bindles are here. Agent Lee says they were turned over to him by Mr. Green after the contact.

As in all cases, on some of the details there are differences of opinion. As a matter of fact, it would be most unusual if this were not so.

In the absence of something else to raise some doubt on the basic story of the officers as told, I don't think I can direct myself to acquit him. And I think, in essence, that's about what the motion amounts to.

If we had a jury, the law doesn't permit the judge to direct them to acquit. Of course, they're not bound by the advice. But there is such a motion.

So the motion to dismiss will be denied.

MR. MORAN: Now if the Court please, and I have discussed this with Mr. Curtin, this Mr. Green will be available—he's being made available at my request for tomorrow morning. I would wonder if it would be inconvenient to take a recess until that time.

THE COURT: I have no objection.

Do you, Mr. Curtin?

MR. CURTIN: If counsel requests it, we certainly—It's within the discretion of the Court.

THE COURT: Well, I haven't any objection. I assume that we'll be able to finish this case.

MR. CURTIN: I believe probably tomorrow.

THE COURT: Well, so that counsel may know, you have all day tomorrow. Friday morning I have the psychiatric calendar in the morning. So you have Friday afternoon.

MR. MORAN: I'm sure we'll finish tomorrow. Probably in the morning.

THE COURT: Well then, the defendant's request will be granted, and we'll take a recess until 10:00 o'clock tomorrow morning.

(Whereupon an adjournment was had until Thursday, April 12th, 1962.)

[fol. 246]

THURSDAY, APRIL 12th, 1962 MORNING SESSION:

PROCEEDINGS

THE COURT: Good morning, gentlemen.

MR. CURTIN: Good morning, Your Honor.

MR. MORAN: Good morning.

THE COURT: Are you ready to call your first witness?

MR. MORAN: Mr. Cooper, will you take the stand.

JOE NATHAN COOPER,

called as a witness on his own behalf, having been first duly sworn, was examined and testified as follows:

THE COURT: Is it Joe Cooper or Joseph Cooper?

THE WITNESS: It's Joe Nathan. Joe Nathan Cooper.

DIRECT EXAMINATION

BY MR. MORAN: Q Mr. Cooper, do you own a 1957 Oldsmobile?

A No, sir, I don't.

Q Did you on occasions have the use of a 1957 Oldsmobile?

A Yes, a couple times I did.

Q And whose automobile is it?

A It belongs to Barber.

Q Charles Barber? A Yes, sir.

Q And is that a relative of yours? A Yes, sir.

Q And you on occasions during the period from last April resided with your aunt, Mrs. Gulley, in Richmond?

A Yes, sir.

Q Did she also have a car? A Yes, sir.

Q And did you use that from time to time?

[fol. 247] A Yes, sir.

Q Now, you've heard the testimony here concerning a Frank Green.

A Yes, sir.

Q Do you know Mr. Green? A Yes, sir. 1943.

Q You've known him over a period of years.

A Yes, sir.



Q Now, what was the year you first met him?

A 1943.

Q All right. Now, then, following 1943, were you away from Richmond for a period of time?

A Fourteen years or better.

Q And returned after that time. A Yes, sir.

Q Now, after April of 1961, did you occasionally see Green?

A I seen Green in July and also I seen Green during the time—sometime during the latter part of the summer.

Q Of 1961. A Yes, sir.

Q Now, there were approximately two occasions when you were with him.

A Yes, sir.

Q And where were you at the time, the first time you saw him.

A The first time I was at 6th and Macdonald in the barber shop.

Q All right. And where did you see him the second time?

A Well, the second time I seen him there in the barber shop.

Q What was taking place at the time you saw him?

A Well, we was gambling together there.

[fol. 248] Q And were there others involved?

A Yes, sir. There's quite a few of them were in there. That's every day gambling there.

Q Did a dispute arise between you and Green at that time?

A Yes, sir, it did.

Q And was money owed to you from Green as a result of some gambling activities?

A Yes, sir, it did. But it didn't take place—the scuffling and little fight he and I had, it taken place somewhere between nine or two—about nine days or two weeks before this arrest.

Q I see. Did that relate back to this gambling activity?

A Yes, sir.

Q And was it because of money that was owed to you?

A Yes, sir.

Q Now, the scuffle, that was sometime in the early part of December.

A Yes, sir.

Q And where did that take place? A On 6th Street.

Q And Macdonald in Richmond. A Yes, sir.

Q What happened?

A Well, he and I got to arguing over the money, after he got broke in the game. So he kept annoying me, asking to borrow some money for me. So I let him have \$7.00 for a shot. He lost that. He got broke. After he got broke he kept annoying me for more money. So I said, "I'll lend [fol. 249] you the money." He said, "I'm making \$45.00 a day. I'll let you have the money back." I said, "I'm going to have to ask for my money on payday or run you down for it." So I give him the money. And he goes on about two weeks before I ever get a chance to talk to him about the money. So then I asked him about the money. Well, it started an argument from one word to another. I asked him, I said, "You could have give my money to me; you could have give it to my relative or anybody if you wanted to pay me my money." So one word led up to another. It led up to an argument, and he and I had just a fist fight.

Q Now, after that time, have you ever seen him again prior to your arrest on December 21st?

A No, sir. I seen him off at a distance once on—down on Macdonald Street, there on 6th and Macdonald, but never was close to him any more.

Q You never saw him to talk to him.

A No. No, he wouldn't talk to me.

Q Were you ever within ten feet of him?

A No.

Q Did you ever see him down at the parking lot at Newell's Market on any occasion?

A No.

Q Whether it's— I'm not referring just to December 21st. Did you ever see him or meet him in that parking lot?

A No.

[fol. 250] Q Or within a block or two blocks of that parking lot.

A No, I didn't.

Q Do you recall if you were in the vicinity— I'll withdraw that.

Your aunt's home is two or three blocks from this market.

A Yes, sir.

Q Do you recall whether or not on the 21st of December you were at the Newell's Market?

A No, sir, I wasn't, not that day.

Q Do you recall where you were between the hours of, let's say, 12:30 p.m. and 3:30 p.m. of that day? This is the day you were arrested.

A Yes, sir. Well, I left 440-15th Street and I had spent the night there at 440-15th, and then I left. I came by my house where my aunt was, because she was raving about "Let's go do Christmas shopping with the kids."

Q What time was that you went over to your aunt's house?

A Must have been somewhere around about 10:30, something like that.

Q How long did you stay there?

A Just long enough to slip off my shoes—change shoes.

Q You left about what?

A It must have been somewhere between 10:30 and 11:00 o'clock. I wasn't there but about a few minutes.

Q Where did you go then?

[fol. 251] A I went to a Miss Carr's.

Q That's this Edna Mae Carr that's been mentioned.

A Yes, sir.

Q You went to her house. A Yes, sir.

Q Where does she live, by the way?

A She live between 26th and 27th on Cutting.

Q And how long did you stay there?

A Just about five or ten minutes, to the best, because she already was getting ready, wrapping her baby up. She was getting out of the bed because she had just come out of the hospital. She said it was a sunshiny day, "and I'll come and call your aunt and tell her if she will take me down town."

Q Don't tell us what she said. How long did you stay there?

A Just a few minutes. Just long enough for her to come down and get in the car.

Q She got in the car with some of her children.

A Yes, sir. Three.

Q The baby and—

A And the eleven and twelve.

Q Where did you go from there?

A To her mother's house.

Q Where is that located?

A That's located in North Richmond.

Q Approximately where?

A That's on Gertrude Street, if I'm not mistaken.

[fol. 252] Q You spent some time there.

A Oh, about an hour and fifteen minutes exactly, I think.

Q All right. About what time did you leave that home?

A We left there around about— It must have been somewhere around—after 1:00 o'clock, a little after 1:00 o'clock, something like that.

Q Where did you go to then?

A We went downtown on 7th and Macdonald.

Q And parked on the street. A Yes, sir.

Q And at that time did you do the Christmas shopping?

A Yes, sir. That's why I joined my aunt and her family.

Q Now, did you continue that shopping up until the time you returned to your car and were arrested?

A Yes, sir, I did.

Q Now Edna Mae Carr, is she in the—under arrest at the present time?

A At the present time she wasn't under arrest.

Q Well, I mean she's awaiting trial.

A Yes, sir. She waiting trial now. She got arrested along the time I did.

Q Now would you tell the Court what happened as you completed your shopping and approached your car on December 21st and down at 7th and Macdonald.

A I completed the shopping. My aunt and I and her two daughters eleven and twelve, and my aunt's three kids, sixteen, thirteen and ten and sister Maxwell's [fol. 253] daughter Gloria Maxwell, which she is about fourteen, we all went from one department store to an-



other one. On my way back from down toward—between—from 10th Street back that a-way from the women's dress shop, coming back—we come on the far side, on the south side of Macdonald, coming from back towards 10th Street, and Miss Carr's two daughters they taken a dollar and a half apiece and went in a store and bought some handkerchiefs for school, to make a present, and they bought some popcorn, large bags of popcorn. And the oldest girl left her handkerchiefs in the store someplace and they began to squabble about it. So we went to turn around to go back and see could we locate the handkerchiefs that she bought for a present, and we didn't locate the handkerchiefs so they began to quarrel among themselves, so I told them, "Oh, don't quarrel—don't talk like that—"

THE COURT: We don't want to know what you said to them.

A I asked her, I said, "Get you some popcorn." So they bought two large bags of popcorn, oversize bags. We was eating the popcorn, coming down the south side toward 10th Street. When I got to the corner on 7th, I turned to come across the street and under the light there. We had to come from then to—that must be east—east side, coming back to the west side of Macdonald on 7th Street, and just when I entered the corner there, and [fol. 254] I told Miss Carr, I said, "Well—" I said, "Can't you unlock the door?" I had an armful of stuff that we been shopping. And I had four pair of shoes for cleaning and one repair, which is the pair I have on now. And I said, "Well, you get up under the wheel and drive."

Q Get what?

A I said, "Get up under the wheel and make a block so I can stop in the shoe shop, this shining parlor here on 6th Street, and ask this guy would he clean these shoes." She said, "Well, you know I can't unlock that door because it's kind of hard to unlock." It's a new lock. So I said, "Hand me the keys. I'll try it." Just when I got to the car door to go to reach for the car, that's when these guys—had on blue jeans, kind of like trench coats, you know, work clothes, and that's when— I didn't see them when I got there. As soon as I went to bend over the car, that's when someone tackled me like that, (Dem-

onstrating) grabbed me. Somebody had my head back. And so by this scuffling a-going on, I turned around and I yelled out—I hollered.

Q You yelled what?

A I yelled out and hollered.

Q Yes.

A And so Miss Carr's oldest daughter—she's kind of overwitted—and she just had like a nervous wreck, you know. She just wet all her clothes all up and she collapsed there.

[fol. 255] Q How many men were involved there, as you recall?

A About eight men to my notion.

THE COURT: You didn't recognize any of them.

THE WITNESS: No, sir, I didn't.

Q (By Mr. Moran) Did you see any of them as they were coming up behind you?

A No, sir, I didn't. So when they had me on each side and had my head pulled back that a-way and a lock around my head, I taken the guy to be a Chinese looking guy—I don't know whether he was especially, Chinese—he was Judo-chopping me in the neck. So the other guys grabbed me and— I lost all my teeth there. These are numb now. These got to come out. This is numb now. They was swinging at me. I said, "What you guys want?" They said, "We is the narcotics." I said, "What do you mean?" He said, "We're looking for narcotics." I said, "Wait a minute. Don't kill me." I said, "You don't have to kill me if you want to look for narcotics." I said, "Look in my car." He said, "What?" I said, "Look up on the blinds." There was a green container billfold there. I said, "Look in there; you may find some there," trying to get him lose his hold. He said, "You got some in your mouth." I said, "There's nothing in my mouth." So by them working on me so long, I run out of gas and by me laying back on the car, they had me all straining back, one guy come across the hood of the car and got my head back. So by them banging on me, well [fol. 256] I just lost out, you know, on my feet.

Q Did one of the officers put his finger in you mouth?

A I don't remember. I don't remember.

Q You don't remember biting anybody's finger?

A No, sir, I don't.

Q Did any of the officers accuse you of having swallowed something or put something in your mouth?

A He— Well, he told me after we got to the station—

Q I mean while you were there at the scene.

A When we got in the car, I remember one officer asked me, said, "Did you have anything in your mouth? Did you swallow something?" I said, "You didn't get nothing, boy," like that. That's what I said to him. He said, "You can take it easy. I'm the Federal. If there's any arrest, it's our case." I heard him tell Sergeant Billingsley that.

Q Who said that?

A This Yates.

Q Yates?

A He said, "Take it easy. There ain't going to be no more fighting." He said, "You satisfied?" I said, "Yes, sir, I am." He said, "Okay, just be quiet." I said, "Would you please fix it so I can get some air? I'm about to faint." I said, "Let me spit some teeth out." The blood was streaming out then. My nose was busted in there. I had my breath cut off. I said, "You all got [fol. 257] my teeth knocked out." He said, "We'll be in a station in a minute." Somehow or another they opened my clothes out. He said, "Well, you can take it easy." He said, "We don't believe in that brutality." He said, "You know, the Feds work much easier than that." Sergeant Billingsley said, "You better be glad we were on the front side of the street." He said, "If we had you on the back street," he said, "we'd have killed you."

Q That was Billingsley.

A Yes, sir. And he said, "You caused a big commotion like that down there, everybody looking on like that, with all that yelling, hollering going on." I said, "I didn't know who you guys were, robbers, gangsters, or what." He said, "Didn't you hear me when I said I was an officer?" I said, "Afterwards, after you done tackled me, one of the guys say, 'I'm an officer.'" I said, "I won't resist arrest." I said, "Well, lose your hold, because you're going to break this arm. This arm can't stand no twisting. The bone has been removed and I only got one

bone." I said, "Feel at the end of my arm there, you will feel the end of the bone sticking up." He said, "Okay. Well, you're under arrest." So Sergeant Billingsley told me, said, "Well, if we'd have had you on the back street we'd have killed you."

Q You just told us that.

A So the fellow didn't—he said, "Well, you know if [fol. 258] there's any conviction here," he says, "it's our case."

Q While you were still down there, at any time did you jerk or wrench your left arm away from one of the officers?

A No, sir, I couldn't.

Q Do you have strength in that left arm?

A No, sir, not no strength at all. The bone has been removed from it.

Q That was injured several years ago?

A Yes, sir.

Q And a portion of the bone removed.

A Yes, sir.

Q Now, were you bleeding in the area of your face, your nose, your mouth?

A Yes sir.

Q At the time of the arrest.

A Before they arrested me, you mean?

Q No, just as a result of the arrest.

A Yes, sir.

Q And where generally were you injured?

A My mouth and my jaw, my chin here, and my nose.

Q Were those areas bleeding?

A Yes, sir.

Q You mentioned something about your teeth being out. Were they actually pulled out or knocked out— A No, sir.

Q —or were they loosened?

A They was knocked out. (Demonstrating)  
[fol. 259] Q How many teeth did you lose?

A Oh, I lost three teeth; one was a tooth that I just worn in the side, you know, a partial plate, and I had one on each side, a bridge, one on each side there. And the other teeth was ones— My original teeth was already in. These here the doctor said down here in Martinez that



they got to come out because they going to tie them back up. The nerves or something is numb around there and he can't get—

Q They weren't loose before this occurrence.

A No, sir.

Q Now, who transported you from 7th and Macdonald? Who drove you back to the Richmond Police Department?

A Mr.—Agent Billingsley rode along for one, and the fellow—I think his name is Jacobs, if I'm not mistaken. This fellow told Sergeant Billingsley—he told me, he said, "Consider yourself under Federal arrest."

Q You told us that. Those two officers took you back to the Richmond Police Department.

A Yes, sir.

Q And were you questioned at that time after you were taken there on that day?

A Yes, sir, I was.

Q By whom?

A By the Federal officers.

Q That would be Yates and the—would it be the Chinese officer, Lee?

[fol. 260] A It was Yates and a Chinese officer, and I don't remember—There was another guy standing by; I don't know what department they were working in.

Q Was Mr. Groom, Agent Groom there?

A No, sir, he wasn't there.

Q Billingsley was there. A Yes, sir.

Q Any other Richmond Police officers?

A Yes, sir. It was some more standing around, but I don't know the guy's name. It was some more standing around. Also the booking officer.

Q Did they search your clothing at that time?

A Yes, sir, they did.

Q Did they bring some articles from your car?

A They brought a brown paper bag with an Army discharge, some letters and papers like for here, just a bag of them, with a band—rubber band around it.

Q Where had those articles been?

A They was in the glove compartment. And they brought my hat. I had a brown hat and he taken all the lining and torn it out of it. He brought that up.

Q You had been wearing a hat that day?

A I had on a hat, yes, sir.

Q You generally wear a hat when you're out?

A Yes, sir. Generally all times.

Q Did you have a conversation then with Billingsley at the Richmond Police Department?

[fol. 261] A That day?

Q On the afternoon of your arrest.

A When we got to the station, the Federal officers talked to me first.

Q All right.

A They said— He told Sergeant Billingsley, he said, "This is our case." Sergeant Billingsley said, "All right." "Because we got our money out. If this is the Joe Cooper we're looking for." I told the fellow, "You must have got me mixed up with Joe Cooper that got killed the other day." He said, "Who?" I said, "The dope fiend Joe Pepper from Sacramento, Stockton." He laughed. He said, "You the one." I said, "All right." He said, "We had a list, a paper that long with lines and a number on it."

Q An arrest sheet?

A It was— The paper looked to me about, oh, being about that wide. And it was about that long with numbers on it from bills, the money.

Q Oh, I see.

A And he say, "You may—get over here with this guy." He said, "You know how the Federals work." I said, "I guess so." He said, "You may get over here with this guy and check your money. I don't want to see nothing but fives and tens. Check with him. We call the numbers off; see if he got it." He would call the bills off. He and I both would get on the line and check. I said, "I [fol. 262] know definitely I don't have the money." He said, "No, something must have happened." So they all three went over to the side and talked. They turned around and said, "Well, Merry Christmas, Cooper," like that. (Indicating)

Q Which one was that, one of the Federal officers?

A Yes, sir. The little Chinese guy said, "Merry Christmas." He said, "You're a strong man." So we all laughed and shook hands. He said, "Well, we'll go." I said, "Well thank you guys very much." I said, "Definitely

I knew you had me mixed with the wrong man." I went to put on my watch, my ring back on, and my money back in my pocket. Agent Billingsley said, "Wait a minute. We can put a parole hold on." He told the desk man, "Put a parole hold on." He said he broke his damn watch messing with me. He said, "You won't see Christmas outside." I said, "Shame on you, Sergeant; you can be like the rest of the guys." I said, "I just buy you a watch band for a Christmas present." I thought he was playing. I said, "I thought you just kidding about locking me up." He said, "No, put a parole hold on." So he put a parole hold on me. Well, when standing there during the conversation he said, "Now you can start anying or say anything I don't like." He said, "Be a long time," he say, "before you hit the ground." I said, "Shame on you, Sergeant." I said, "You should be like the rest of the guys; we just apologized." I said, "If I did anything wrong to you, I didn't mean anything wrong." He said, [fol. 263] "You son-of-a-bitch, just say anything I don't like." He said, "How old are you now?" I said, "Sixteen." He said, "I'll turn that Chinaman loose on you or a Mexican guy, either one; you won't have a possible chance." He said, "We got you down to the station, you say anything we like." I said, "I can't fight all you guys." I beg him to uncuff me pretty soon. He uncuffed me a long while after I was there, he uncuffed me. So I said, "Well, I can't fight all you guys, but—" He said, "Well, if you just say anything I don't like, I'll split your damn—don't get smart telling me you're sixteen years of age." I said, "I have respect for your age Sergeant, but" I said, "you most too old to try to split my head." So he got angry and after me and him quarreled a while I said, "I'm sorry, Sergenat; we just apologize, it's just one of those things. I have respect for your age."

Q: Did the Federal officers indicate what they were going to do so far as prosecution?

A: No, sir. Mr. Groom told me the next day, he said, "Cooper, do you remember meeting me?" So he said, "We met yesterday," and said, "You bit my finger." I said, "Well," I said, "I'm very sorry. I didn't know nothing about biting your finger." So he and I shook hands and apologized. So I was teasing Agent Billingsley why

he wouldn't be like the younger man was, apologizing. And that was the conversation between me—Mr. Groom the next day about it. He said, "Well, I won't file this [fol. 264] thing on you Cooper." So when I got relieved I said, "I still apologize, Mr. Groom, if I bit your finger. I didn't know about biting your finger," I said, "because you guys knocked all of my teeth out." I had a handkerchief at my nose and mouth during the time then.

Q You what?

A I had my handkerchief at my nose and mouth, because they were bleeding the next day; for a fact, for the first thirty days I wasn't able to eat anything.

Q The officers talked to you the following day, did they?

A Yes, sir.

Q Was there any discussion concerning marijuana on that second day?

A Yes, sir.

Q And what was that?

A He asked me, he said, "Well, what did you have in your mouth?"

Q Mr. Groom asked you? A Sergeant Billingsley.

Q Sergeant Billingsley.

A Yes. I said, "Well," I say, "it could have been marijuana." I said, "You didn't get nothing." He said, "Listen," he said, "now we want to talk to you and we want to try to act nice with you." He said, "What did you have in your mouth?" I said, "Well, I don't know." I said, "It could have been marijuana; it could have been breath pills." I said, "I got a shirt pocket full of breath [fol. 265] pills." He said, "Do your parole officer like you to take them?" I said, "Well, for the holidays and the misery he know I am in, he wouldn't mind." I said, "That's why I have those breath pills." I said, "I paid a dollar and a half for them." So he said, "Well, was that marijuana in your mouth?" I said, "Well, yes, it could have been a joint of marijuana." He said, "What else could it have been?" I said, "I don't know. I was half drunk on that Vodka, man." He said, "Do you smoke marijuana?" I said, "I did at the time before I went to the joint in Los Angeles." He said, "How regular?" I said, "Oh, not too—"



Q Wait a minute until that motorcycle goes by. What did you say after Los Angeles?

A I said down in Los Angeles before I went to the joint. He said, "How regular?" I said, "Oh, not too regular." He said, "When was the last time you had some?" I said, "Oh, about '57 or somewhere back in the early fifties." He said, "Well, do you ever get any up here?" I said, "No." He said, "Well, who is selling it around here?" I said, "Oh, I don't know." "How much do they get for it?" I said, "I don't know what they get for it."

Q I don't want to go into that. But that was essentially what was said concerning marijuana.

A Yes, sir.

Q Was he still talking about—I didn't want to interrupt you.

[fol. 266] A—Yes.

Q He said, "Were you able to get any up here?"

A Yes.

Q All right, go ahead.

A I told him, "No." He said, "What do you do, bring some back?" I said, "Oh, are you kidding? You mean to say I drive from Los Angeles with some marijuana?" He said, "Well, I thought maybe you may get you some." I said, "No, sir. I haven't had any since '57."

Q Do you use heroin? A No, sir, I don't.

Q Have you ever used it? A No, sir, never have.

Q You previously have been convicted of a felony, have you not?

A Yes, sir.

Q And that goes back to several years?

A Yes, sir. I got in trouble in 1956.

Q That answers that. You told the officers about that?

A Yes, sir.

Q Did you ever, on December 21st or on any other date, get a phone call from Mr. Green in which he suggested that you meet at Newell's Market?

A No, sir.

Q Did Green on any occasion, either call you or see you and ask for a duce?

A No, sir.

Q Does the expression, duce have any meaning to you?

[fol. 267] A No, sir.

MR. MORAN: I believe that's all.

THE COURT: Cross examination.

MR. CURTIN: Yes, Your Honor.

### CROSS EXAMINATION

BY MR. CURTIN: Q For the record, Mr. Cooper, you stated you have been convicted of a felony. And what was that for, sir?

A 501, drunken driving. And rolling marijuana in a blue container box at a party.

Q The 501 was one felony. A Yes, sir.

Q That's the Vehicle Code felony, drunk driving.

A Yes, sir.

Q And the second felony was Section 11,500 of the Health and Safety Code, sale of a narcotic, was it not?

A Yes, sir.

Q Now Mr. Cooper, you stated to his Honor, the Court, on your direct examination that you received some wounds that were causing you to continue to bleed, even the next day. Is that correct?

A Yes, sir.

Q What kind of wounds did you get?

A Oh, I had a busted nose, and I had a cut scar coming down on the lip, and my other lip, my bottom lip was busted. And my teeth, practically all my teeth; they still bothering me. And now the doctor over there tell me [fol. 268] couldn't do nothing about it because he said I have to lose these down here.

Q You said you were even bleeding the next day?

A Yes, sir.

Q Were you bleeding on the day of your arrest?

A The day I got arrested?

Q Yes.

A When the wrestling started, yes, I started bleeding.

Q And so the rest of that day after the arrest, you were bleeding; you were bleeding the next day. Is that right?

A Yes, sir. I bled a couple days straight.

Q Isn't it a fact you didn't have any wounds on your face whatsoever.

A Beg your pardon?

Q I say isn't it true, sir, that you didn't have any cuts or wounds on your face whatsoever.

A Oh, no, sir, I had wounds. I still have wounds now. You can come up and check my teeth here and they all loosened.

MR. CURTIN: May the record show, Your Honor, I'm showing a picture to defense counsel. (Handing)

MR. MORAN: (Examining)

Q (By Mr. Curtin) Now, do you remember them taking a photograph of you, Mr. Cooper, on the day of your arrest?

A Yes, I remember Sergeant Billingsley taken me to the water back in the bathroom and let me put a cold handkerchief to my nose to keep that blood from running [fol. 269] out of my nose and mouth.

Q I'm going to show you this photograph and ask you, sir, if that isn't a photograph of you taken on the day of your arrest. (Handing)

A Of the day on my arrest?

Q Yes, sir.

A I don't know whether this was taken on the day of my arrest, because the day on my arrest they didn't take no photograph; I mean to my notion. I mean, not as I can remember. But I do know that my teeth was all—I was complaining about my teeth because the booking officer at the desk, I complained to him for some kind of medication.

Q Well, isn't that photograph taken the afternoon after all this scuffle and fight that you told us you received wounds to your face?

A That's a photograph of me, sure is true.

Q Isn't that taken on the same afternoon?

A I wouldn't say it was definitely taken on that same afternoon. I can't remember.

Q Do you see the dates on there, the 21st of December, 1961? Is that wrong or right, sir?

A They didn't take a picture of me the 21st of December, sir.

Q This picture wasn't taken of you on that day, sir.

A No, sir. I wasn't questioned and they didn't take any on that date.

Q Isn't that a fact that's the way you looked on the [fol. 270] afternoon after the scuffle, sir?

A Well, I could have— I can't see my teeth inside. That don't mean nothing about my teeth inside.

Q This photograph doesn't show any wounds or cuts on your face at all, does it.

MR. MORAN: The photograph speaks for itself.

THE COURT: Yes.

A It don't show no scratches on there, but it definitely—you can look around my chin, man, and see it's swollen around there.

MR. CURTIN: We'll offer it, Your Honor, as People's next in order.

THE COURT: All right. It will be received in evidence and marked People's Number 11 in evidence.

(Whereupon the photograph above referred to was received in evidence and marked People's Exhibit No. 11.)

Q (By Mr. Curtin) Now Mr. Cooper, you did drive and have in your possession a 1957 Oldsmobile, isn't that right, sir?

A What day, sir?

Q Well, during the time you were living at 536 South 20th Street with your aunt, Mrs. Gulley.

A Was that on the 21st day of December?

Q Yes.

A Yes, sir, I was driving one that day, that afternoon.

Q And to whom was that automobile registered, sir?

A Charles O. Barber.

[fol. 271] Q Where does he live? A Los Angeles.

Q And you had possession of it up here in the Bay Area and he lived in Los Angeles, is that right, sir?

A Well, now, he—he have possession at all times, but he let me drove it, yes, sir; he let me drove it.

Q And you then had the possession to drive it around the Bay Area where you lived.

A What do you mean by around the Bay Area, sir? I didn't get that one.

Q Well, when did Mr. Barber let you have the car?



A. Oh, somewhere—I was down in Los Angeles the 1st of December.

Q And who did you go to Los Angeles with, sir?

MR. MORAN: I'll object. I think it's incompetent, irrelevant and immaterial.

THE COURT: Well, I think it's material under the circumstances under which he's permitted to use the car and how often he drove it. It will be overruled.

Q (By Mr. Curtin) With whom did you go to Los Angeles with, sir?

A With myself.

Q With no one else? A No, sir.

Q You didn't go with a lady? A No.

Q Do you know Freida Pennington?

A Yes, sir, I do.

Q Isn't it a fact you went to Los Angeles with her?  
[fol. 272] A When, on the 1st of December, sir?

Q Yes. A No, sir.

Q Have you been to Los Angeles with her?

A Yes, I been to Los Angeles with her.

Q When was that, sir?

A Oh, I don't know, sometime way back.

MR. MORAN: I'll object again as being incompetent, irrelevant and immaterial.

THE COURT: Yes, it will be sustained.

I think you will have to limit the occasion when he got the car.

Q (By Mr. Curtin) Mr. Cooper, you have driven the car, this '57 Oldsmobile, in the months of November and December, 1961, in the downtown area of Richmond, have you not?

A Well, I don't know exactly the date I drove it down there.

Q But you have driven it down there—

A I have driven in Richmond.

Q And you've been down on Macdonald Avenue around 5th Street, 6th Street, and 4th Street during the months of November and December, 1961, in that car.

A I came through 6th Street and it would be very seldom I would be down on 6th Street, very seldom.

Q Wouldn't you have occasion to go down to a shoe shop once in a while?

A No.

Q You never went to the shoe shop—  
[fol. 273] A They don't gamble there, sir.

Q What?

A They don't gamble there, sir.

Q They don't gamble there. A No, sir.

Q Is the only reason you go downtown is to gamble?

A I mean, that's the onliest recreation down there to do.

Q I'm sorry. The only what?

A The onliest recreation that the guys do.

Q Haven't you had occasion to go in the Economy Shoe Shop downtown near 5th and Macdonald in the City of Richmond?

A No.

Q You don't know a William Hawkins who worked there in the shoe shop?

A I know Mr. Hawkins 1947 when he was running the Brown Derby.

Q But you hadn't seen him down there in that area?

A Well, I wouldn't—just specifically see Mr. Hawkins down there, because I never paid that much attention. I have seen Mr. Hawkins around Richmond, but just on the particular day, I don't know.

Q Well, I'm going to refer your attention to specifically the 5th of December, 1961. Didn't you drive west on Macdonald and stop at 5th and Macdonald and Mr. Hawkins get in your car and—

A Somewhere—

Q Pardon me.—and you drove him down to 4th and Macdonald and you let him get out of your car and then  
[fol. 274] Mr. Hawkins returned to your car again a short time later. Do you remember that?

A It couldn't have been—It could have been around about the 5th that I was in Richmond during the time, but I think, if there was no mistake—I'm not positive about the date—somewhere around about the 5th or 6th or the 7th I came back from Los Angeles. I don't know exactly what date it was. And—But now as far as Mr.

Hawkins, I don't remember riding with Mr. Hawkins. I do remember riding one another, her two sisters and first cousin; I know that—the girl that I was engaged to.

Q Mr. Cooper, were you employed during the month of December, 1961?

A Was I employed?

Q Yes, sir. A No, sir.

Q Did you have a business or occupation during that time?

A No, sir.

Q What was the source of your income?

A I got a check every month.

Q From whom, sir?

A I get one from the State.

Q And what was that for, sir? A Disability, sir.

Q And how long had you been getting that?

MR. MORAN: I'll object to it as being incompetent, irrelevant and immaterial.

THE COURT: Well, I suppose it ought to be limited [fol. 275] to some period around here.

Q (By Mr. Curtin) Let me ask you this: How long had you been living at 536 South 20th Street in the City of Richmond?

A Ever since somewhere around about the month of April.

Q And where had you lived prior to that, sir?

A San Quentin, California.

Q And then when you were released you went directly to Richmond to live, is that correct?

A Yes, sir, I did. But I didn't stay there.

Q You did not stay in Richmond?

A No, sir, not stay.

Q Where did you live, sir?

A I went to Los Angeles.

Q Isn't it a fact, Mr. Cooper, that on several occasions when you went to Los Angeles that you bought heroin down there and you bought marijuana and brought it back to the Richmond area?

A No, sir, I did not.

Q Isn't it a fact that when you went down there you had two shoe boxes and in one shoe box you had a white powder and in the other shoe box you had marijuana.

A Never at no time.

Q Isn't it a fact that you brought those two shoe boxes back to Richmond?

A Never at no time.

Q Isn't it a fact that you had those shoe boxes in the [fol. 276] bathroom of the house there at 536 South 20th Street.

A Never at no time.

Q Isn't it a fact that Freida Pennington saw you on one occasion sniffing the white powder in the bathroom there at 536 South 20th Street.

A No, sir.

Q You know what marijuana is, do you not?

A Yes, I do.

Q Have you given marijuana at any time to anybody around the Richmond area?

A No, sir, I haven't.

Q Never at any time. A No, sir.

Q You haven't given marijuana to Frank Green.

A No.

Q You didn't give some marijuana to Hawkins.

A No.

Q Now, Mr. Cooper, you did swallow something when the officers tried to arrest you, did you not?

A I can't remember exactly whether I swallow nothing or not, but I do know I was eating breath pills.

Q But you can't remember at the time when the officers said you were under arrest, you said, "Okay," and you ducked down and you said, "The marijuana is up on the visor." You don't remember saying that?

A I remember when the officers were tackling me and had me all spread out and had me out of wind, I said, [fol. 277] "Don't kill me." I said, "If you're looking for marijuana, why don't you look in that billfold up there." That's what I told them.

Q Had you carried marijuana up there?

A I said, "Look in my billfold if you're looking for marijuana," in order to keep him from choking me, because I was getting out of breath.

Q Mr. Cooper, then you can't recall going into the right shirt pocket of your coat with your left hand and forcing something into your mouth.



A No, sir, I know definitely I didn't.

Q And sir, you didn't remember forcing the finger of the State Agent Mr. Groom into your mouth.

A No, sir. That seems like impossible to me to force his finger down in my mouth, I mean just take his hand and reach down and put it in my mouth. That seems impossible to me.

Q You didn't chew on it for about fifteen or twenty seconds, and the agent screaming for you to let go of his finger?

A I don't remember at no time chewing on the agent's finger.

Q Didn't you spit blood out afterwards, sir?

A From my mouth all mashed up from all the punchings, the way they was hitting at me, all these guys.

Q But you can't remember at all chewing on the agent's finger.

A No, sir, I don't.

Q Now, Mr. Cooper, on the 21st, you were at your [fol. 278] home, 536 South 20th Street in the morning, the early part of the morning hours, were you not?

A The early part of the morning?

Q Yes. You said you were there about 10:30, as I remember.

A I got home somewhere around about 10:30, something like that.

Q Where had you spent the night, sir?

A At 440-15th Street, practically all my nights there.

Q You spend every night there?

A Practically most of the night, every night.

Q Who lives there?

A That's Miss Juanita. That's my engaged—I mean my future wife, Miss Juanita. The lady that been over here every day. That's the address there (Handing envelope)

Q But you did go back to your auntie's house and the '57 Oldsmobile was there on December the 21st, 1961, before the noon hour, you say? Is that right?

A Around about 10:30, yes, sir.

Q And you are now telling his Honor, the Court, that the car wasn't there, then, around 12:30 on the same day.

A I went there around about 10:30, just like I said. But I didn't waste but a few minutes there.

Q And did you go into the house? A Yes, I did.

Q And where did you leave the car?

A The car—it's parked on the street.

Q Out in front of the house? A Yes, sir.

Q And then you went from there up to 25th—or 26th [fol. 279] and Cutting, you said.

A From the house?

Q Yes. A Yes, sir.

Q You go right by Newell's Market, do you not?

A Yes, sir.

Q Who did you see up at 25th and 26th?

A Mrs. Carr.

Q Edna Faye Carr? A Yes, sir.

Q Is she also someone with whom you were going at the time?

A Yes, sir, I was going to pick her up.

Q She's a friend?

A Yes, sir, she's a friend of the whole family.

Q Now on one occasion or some occasions you've let Edna Faye use your car, that '57 Oldsmobile, did you not?

A No, sir. Her family have one. Her first cousin have one just like it only his is a ninety-eight.

Q Edna Faye has been over at 536 South 20th Street when you were there, was she not?

A Yes, she have been there.

Q On December the 7th, didn't you bring the car home and go in the house and see Edna Faye and didn't Edna Faye come out of the house and get in the '57 Oldsmobile?

A She was in the hospital somewhere around about—to my notion, not being definite about the date—but somewhere around about—The baby was only two weeks old the day she went downtown. She had been home two [fol. 280] weeks. She must have been in the hospital around about the 7th. I'm not positive about it, but I think it was somewhere around about the 7th. I can find out the date definitely, though, what date it was. I think it was about the 7th when she was in the hospital with the baby.

Q Isn't it a fact, Mr. Cooper, that on that day, the 7th of December, you were called by a woman from San Francisco and asked for narcotics, and you said to call you back when she got over in the Richmond area.

A No, sir.

Q That didn't happen? A No, sir, I did not.

Q Isn't it a fact that on that same day you had Edna Faye Carr deliver some narcotics for you to Newell's Market at 23rd Street in the City of Richmond?

A No, sir. At no time.

MR. MORAN: If the Court please, I'm going to object—

THE COURT: I beg your pardon?

MR. MORAN: I'm objecting to that as immaterial and irrelevant.

THE COURT: It will be overruled.

Q (By Mr. Curtin) Now, for the record, Edna Faye has driven that '57 Oldsmobile when you weren't in it, isn't that right?

A I think Edna Faye drove that Oldsmobile twice to my notion downtown; went to pick up some cleaning one day and once at the barber shop. And she drove it from [fol. 281] the barber shop to her mother's house with her mother's—picked her mother up from work, and also she had, oh, three kids in the car and her brother's little kid. She drove from downtown, because it was so late down at the barber shop and I was getting a hair trim, and by the kids being a little sick, she drove them on home.

Q Isn't it a fact, Mr. Cooper, that Edna Faye Carr was using narcotics?

A I don't know. I wouldn't say definitely.

Q You wouldn't say definitely. A No, sir.

Q Isn't it a fact that she was putting it in her arm, sir?

A I wouldn't say it definitely, because I got pretty inquisitive about it myself. In fact, the day I got arrested she and I was arguing about it.

Q About that, sir?

A About stopping and talking to so many guys—I call them tramps. So that's what we was arguing about.

Q You were arguing about the fact that Edna Faye was an addict in narcotics?

A No, I didn't know definitely whether she was an addict or not.

Q But you did know or have some knowledge whether she was using narcotics.

A I was trying to find out about it, was she an addict or not.

Q Did you ever notice her arms?

A No, sir, not exactly. I didn't see no marks on her arms.

[fol. 282] Q Now, you say, Mr. Cooper, that you never even went into Newell's Market lot on the 21st of December, 1961.

A Definitely no.

Q You never drove the car in that lot and stopped the car in there at any time on that day, is that correct, sir?

A I did not, sir.

Q Now who did you see out in North Richmond?

A When, on the 21st day of December?

Q Yes, sir. A Edna Faye Carr's father.

Q Then am I right in saying that you spent the rest of the day with Edna Faye Carr?

A No, sir. I wouldn't say spent the day with her, because I stopped there at their house about an hour and fifteen minutes, and he and I sit in the car and talked while she and her mother and them—they was in the house getting ready, and you know how they were, planning for the Christmas shopping. And I didn't go in the house, because I was mostly in a hurry—you know, waiting on her to come out. So he just come out and joined me—tried to get me to come in—joined me sitting in the car and talked to me, because they was—you know, kind of a pretty funny family. So I waited in the car. So he come out and got in the car, talking to me. We was talking about losing weight. And we sit there about an hour and fifteen minutes. We drove from there on down, because I told her I had to go by the tailor shop to pick up [fol. 283] the pants for those suits that was in the automobile, those three coats in there.

Q Now, sir, you claim that you carried breath pills. What kind of a container would they be in?

A It's a little old plastic container with a cap that they



use in the new medical age now which you mash down inside. It's just about that long. (Indicating)

Q It was a plastic container? A Yes, sir.

Q Pills would be inside?

A That's what they were bought in.

Q Would you keep it in your pocket?

A Well, to keep from carrying that little old plastic thing in your pocket which makes your shirt bulge out, well I just take me a handful of them and put them in my pocket, which all my clothes practically got them in.

Q Isn't it a fact that the object that you swallowed was wrapped in brown paper?

A No, I wouldn't say wrapped in brown paper, sir.

Q What was it wrapped in?

A Those pills wasn't wrapped in anything at all. Now we was eating popcorn coming across the street; I remember that.

Q Well, I thought that you said a little earlier that you don't remember if you swallowed anything or not.

A Well, he claimed that—he thought he seen I swallowed something. I told him a couple of times, I said, "No, we was eating popcorn." I do know that. Because I had just had gone down to the corner and got me a pint. [fol. 284] of Vodka then. That's why I was eaten popcorn.

Q Now when you went shopping, Mr. Cooper, you left the wallet in the car with money in it?

A Yes, sir.

Q Did you have other money than the money you left in the wallet in the car?

A Yes, sir.

Q You keep money in two places?

A I don't generally carry no money in no wallet. My other wallet is nothing but a bunch of papers and it's worn all out and torn up and I just hated to get rid of it—I had it so long. So I bought one of those little old blue plastic looking folders to carry identification cards where I carry my ID's and things in, so they wouldn't get all mashed up in my pocket. So that why I bought that one. But I was hating to get rid of the old pocketbook. Had so many papers in it. I got a whole bag of them.

Q Now, the phone number at the house—

THE COURT: I think we will take our morning recess, Mr. Curtin.

MR. CURTIN: Yes, sir.

(Recess taken)

(After recess)

THE COURT: Let the record show the defendant is present in court with his counsel.

[fol. 285] Just take the witness stand, Mr. Cooper.

Q (By Mr. Curtin) Mr. Cooper, I was asking you about the phone number at the house where you live, 536 South 20th Street in the City of Richmond. That phone number is Beacon 2-1879, is it not?

A Yes, sir.

Q And you have had occasion to use that phone, have you not?

A Yes, sir.

Q And you have had occasion to have your aunt call you to the phone there, have you not, sir?

A Well, not—She may have called me to the phone because my girlfriend calls me quite a bit. In fact, three girls call me.

Q Now Mr. Cooper, you stated that your recreation was gambling in downtown Richmond.

A Yes, sir.

Q And where would you get the money to use for gambling, sir?

A Well, I got two checks one day and about three days later I got one more check. Besides that I got money from my aunt, and also I has—I has quite a few relatives.

Q And isn't it a fact that the money that you get to use for gambling, you get from selling narcotics?

A No.

Q When you went to Los Angeles on the occasions you've told us about, you gambled down there, did you not?

A Yes, I did.

[fol. 286] Q Isn't it a fact you lost large sums of money down there?

A No, sir, I won some.

Q How much would you win, sir.

A I won from between around about six to eight hundred dollars.

Q And isn't it a fact that on some occasion you've lost as high as a thousand dollars and two thousand dollars?

A No, sir, I win \$2700.00 and lost it all back but fourteen hundred once, I remember, and that was in August, if there's no mistake, August.

Q August of 1961? A Yes, sir.

Q You lost \$2700.00. A I won \$2700.00.

Q I'm sorry. And then you—you say you lost some and then won it back. How much did you lose?

A I say I lost some of it back.

Q How much did you lose back?

A Oh, I lost it all around about twelve or fourteen hundred dollars.

Q Would you carry money around in a brown paper bag?

A Never have, sir.

Q Isn't it a fact you had a brown paper bag in your automobile?

A Yes, sir, with some papers, discharge, and letter, it was in the glove compartment.

Q Isn't it a fact when you went to Los Angeles you had a brown paper bag filled with money?

A No, sir, at no time.

Q Isn't it a fact that Freida Pennington saw that [fol. 287] brown paper bag filled with money?

A No, sir.

Q Isn't it a fact she saw you gambling down there?

A I won't say she didn't see me gambling for a fact, because she did, because she sat there all day and all night there in the gambling shack.

Q The gambling would go on all day and all night, is that right?

A Yes, sir.

Q And isn't it a fact that she saw you on one occasion lose \$2,000.00 down there?

A No, sir. I haven't—

MR. MORAN: Just a minute. I'm going to object to this line of questioning as incompetent, irrelevant and immaterial.

THE COURT: Yes. I don't think there's going to be any tendency to prove any connection with narcotics. It will be sustained.

Q (By Mr. Curtin) Just for the record, Mr. Cooper, you have had large sums of money in your possession.

A You mean since—during the year of '61?

Q Yes, sir.

A Highest I ever had at once was \$2700.00 in a game.

Q And this was from the time you got out of San Quentin—

A Yes, sir.

Q —and while you were living in the City of Richmond.

[fol. 288] A Well, no, that was in Los Angeles. I was down there about, oh, a little better than five weeks all together.

Q Now, you did tell Sergeant Billingsley that you had used marijuana.

A Yes, sir, back in—in the forties and also I think—well, before I went to the joint in '57.

Q And isn't it a fact that you had used marijuana since you got out of San Quentin in March of 1961?

A No, sir, I told Sergeant Billingsley I had been drinking Vodka.

Q Isn't it a fact that you smoked marijuana in the bathroom of your aunt's house, at 536 South 20th?

A No, sir. I wouldn't go nearby there.

Q Well, isn't it a fact that Freida saw you in there smoking a joint?

A She never been in the house but twice.

MR. MORAN: If the Court please, I'm going to object. He's not being charged with smoking marijuana. Perhaps he should have been. My objection is that it's irrelevant.

THE COURT: Yes, I think so. It will be sustained.

MR. CURTIN: Your Honor, then that's all the cross examination I have of this witness.

### REDIRECT EXAMINATION

BY MR. MORAN: Q Mr. Curtin referred to the violation of 11,500 as a sale of marijuana. Did that involve a sale of marijuana?



[fol. 289] A No, sir. I was at a party for Sugar Ray Robinson, and those show girls was dancing they had on the show. I was at a party and I just got out of the hospital, and they came and got me.

Q Well, without going into all that, did it involve passing a box of marijuana at a party?

A No, sir. I pushed a box.

Q All right.

A So that's why they considered it was a sale of narcotics.

Q We showed the picture of your aunt's home taken from a distance, and the officer described—one officer described it as white and the other as a light color. I think it's shown in People's Exhibit Number 8. What color is that house?

A It's dark redwood and brick.

Q What do you mean it's dark redwood? Was it painted or stained?

A Yes, sir, it was painted and stained, because it hadn't been too long we painted it. It's a darker color than that cushion in that chair there.

Q The dark brown cushion?

A Yes, sir, the dark brown cushion.

Q And red brick.

A Yes, sir. It's mostly reddish looking. I forget what color you would call that.

Q And it was that way during December of 1961?

[fol. 290] A Yes, sir. Been that way all the time.

MR. MORAN: That's all.

### RECROSS EXAMINATION

BY MR. CURTIN: Q Well Mr. Cooper, I'm not sure that I understood your answer to Mr. Moran's question about what you were convicted of. You were convicted of Section 11,500 of the Health and Safety Code in the County of Los Angeles, were you not, sir?

A Yes, sir.

Q And wasn't the fact that you were convicted of a sale at that time on—upon or about December the 3rd, 1957?

A Beg your pardon.

**Q** I'll rephrase the question. Isn't it a fact that you were convicted of a sale as charged by that section at that time, December the 3rd, 1957, of Section 11,500 of the Health and Safety Code.

**A** Yes, sir. That automatically is called a sale because I pushed a box, and automatically it had to be a sale, because the guy said—the agent was sitting at the table and he said, "You all pass the box down." I said, "Man, you all get your own box." We was eating down at the end of the table. So the girl from New York what was running that house—had the party, she said, "Well, push the box; just slide the box over." So automatically that goes upon a sale.

**Q** It was a sale, then.  
[fol. 291] **A** Well, they put it down as a sale. Never was a sale. They just called it a sale because I pushed the box.

**MR. CURTIN:** That's all, Your Honor.

#### FURTHER REDIRECT EXAMINATION

**BY MR. MORAN:** **Q** Did you receive any money for that?

**A** No, sir, I did not.

**Q** Did you receive anything of value for that?

**A** No, sir, I did not. I was visiting a party.

**MR. MORAN:** That's all I have.

**MR. CURTIN:** Nothing further.

**MR. MORAN:** The defense will rest, Your Honor.

**THE COURT:** Mr. Curtin.

**MR. CURTIN:** At this time, Your Honor, the People are in the position of moving the Court to file an amended indictment in this case, charging two prior convictions of a felony, one of the same division with which he is presently charged, the defendant now having admitted them in the presence of the Court on the witness stand.

**THE COURT:** Mr. Moran.

**MR. MORAN:** May I see—

**MR. CURTIN:** Yes. (Handing document)

**MR. MORAN:** (Examining)

**THE COURT:** Do you have the information about these priors, Mr. Curtin?

MR. CURTIN: Yes, Your Honor.

THE COURT: I have this in mind: He's admitted two [fol. 292] priors, and says one was 501 and one was sale of marijuana. I suppose that's sufficient, but I still have a feeling that technically it looks a lot better if the information from the prison authorities—from the Court's records were available. They should be put in.

MR. CURTIN: Yes, Your Honor. I have, for the record, shown that to Mr. Moran. I will show it to him again when he's through examining the indictment.

At this time, Your Honor, then the People would offer in evidence certified photostatic copies of the records of the Adult Parole Division in regards to Joe Nathan Cooper, showing a prior conviction. We will offer them—

THE COURT: Suppose I continue this. If you're going to file an amended information—And under the circumstances the motion will be granted; you will be permitted to file an amended information. However, I suppose he still has to be arraigned on it. I suppose no prejudice could result in view of the fact that he's admitted these, but—

MR. CURTIN: Well then, at this time we would offer first the amended indictment, Your Honor, and move the Court to file the amended indictment on behalf of the People.

THE COURT: The motion will be granted and the amended indictment will be ordered filed.

MR. CURTIN: May the record show I am giving Mr. Moran a copy.

[fol. 293] THE COURT: Let the record show that the defendant has been handed a copy thereof.

Would you arraign the defendant, Mrs. Clerk, on the amended indictment.

MR. MORAN: May we have just a moment.

THE COURT: Surely.

(Mr. Moran conferring with defendant)

THE COURT: Would you like to take a recess so you could discuss this with your client?

MR. MORAN: May I have a short recess?

THE COURT: Surely.

All right, we'll take a short recess.

(Recess taken)

(After recess)

THE COURT: Mrs. Clerk, you will arraign the defendant on the amended information.

THE CLERK: Do you waive the reading?

MR. MORAN: We'll waive the reading.

THE COURT: Let the record show that the defendant waives reading of the information.

THE CLERK: You are charged in the amended indictment by the name of Joe Cooper? Is that your true name?

DEFENDANT COOPER: Joe Nathan Cooper.

THE CLERK: Joe Nathan Cooper.

DEFENDANT COOPER: Yes, ma'am.

[fol. 294] THE CLERK: How do you plead to the offense charged in the amended indictment in Count One?

THE COURT: It's identical with the original indictment.

Is it not, Mr. Curtin?

MR. CURTIN: Yes, Your Honor.

THE COURT: Except for the priors.

MR. CURTIN: Except for the two priors.

THE COURT: Count One is the narcotic violation.

DEFENDANT COOPER: Not guilty.

THE COURT: All right. Let a plea of not guilty be entered to the offense charged in Count One of the indictment.

THE CLERK: How do you plead to the offense charged in the amended indictment, Count Two?

DEFENDANT COOPER: Not guilty.

THE COURT: Let a plea of not guilty be entered to the offense charged in Count Two of the amended indictment.

THE CLERK: Do you admit or deny the prior convictions charged in the County of Los Angeles, Violation of Section 11,500 of the Health and Safety Code?

DEFENDANT COOPER: Yes.

THE COURT: You admit that prior conviction.



Let the record show that he admits the prior conviction of a violation of Section 11,500 of the Health and Safety Code in the Superior Court of the State of California in [fol. 295] the County of Los Angeles.

THE CLERK: Do you admit or deny the prior conviction in the County of Los Angeles of Violation of Section 501 of the Vehicle Code of the State of California, a felony, drunk driving.

DEFENDANT COOPER: I admit it.

THE COURT: Let the record show that the defendant admits the prior conviction of felony, Violation of Section 501 of the Vehicle Code in the Superior Court of the State of California in and for the County of Los Angeles.

All right. Anything—

MR. CURTIN: Nothing in rebuttal, Your Honor.

THE COURT: Did we admit in evidence the record of the—

MR. CURTIN: No, Your Honor. We will offer those.

THE COURT: Well, in view of—

MR. CURTIN: It's not needed.

THE COURT: No.

All right. Will there be any rebuttal?

MR. CURTIN: No rebuttal from the People, Your Honor.

THE COURT: The People rest.

MR. CURTIN: The People rest.

THE COURT: Mr. Moran.

MR. MORAN: The defendant rests.

THE COURT: Well, gentlemen, there's no reasonable [fol. 296] doubt, or otherwise in my mind, that the phone call was placed as testified and that the officers were outside the defendant's aunt's home; that he answered the phone there; that he did go over to Newell's Market and was identified there and met Mr. Green and Mr. Green thereafter did turn over the bindles in evidence to Agent Lee and they were found to be heroin. And the Court will find the defendant guilty as charged in the indictment of violation of Section 11,501 of the Health and Safety Code as charged in the indictment.

Very little time has been spent with the second charge in the amended indictment, but I suppose that under the

circumstances disclosed here that the officers had a reasonable ground to believe that the defendant was trying to destroy evidence and they had a legal right to try and do that. And in the course of doing that, the defendant, while he may not have intended to, put Officer Groom's finger in his mouth—I think he probably didn't intend to do it. I'm satisfied when it got there that he thereafter applied force. But I somehow or other have a feeling I'm glorifying this thing by making it an intent to do great bodily injury. Of course, the fact of the matter is that the finger was fairly badly injured. There's been some considerable period of time in healing.

Do you want to be heard on that, Mr. Moran, on the Count Two of the amended indictment?

[fol. 297] MR. MORAN: Well, I think it has been apparent here. The doctor has described it.

THE COURT: I think he committed the acts, and I think the officers, under the circumstances, were justified in believing that he was trying to destroy evidence and were justified to trying to stop him. But—

MR. MORAN: Well, that may—

THE COURT: —it just appears from the view I take of it that I have to be rather technical to—

MR. MORAN: Certainly there was no intent evidenced to commit mayhem on this officer.

THE COURT: Well, I don't think that's exactly what's required. I think he assaulted the officer. I think he bit on his finger when it got there all right, and I think he did it with the intention of hurting him.

Great bodily injury does not seem to me to be superficial lacerations, which was the only medical information that we received on this. I suppose he could have bit his finger off. But I don't think that was the intent. I think he intended to hurt him all right.

MR. MORAN: I think that's about it.

THE COURT: Do you want to be heard on that count, Mr. Curtin?

MR. CURTIN: Yes, Your Honor. The matter of mayhem was not charged because that would have been much more difficult to sustain.

[fol. 298] THE COURT: Yes, he has to—

MR. CURTIN: Likely to produce great bodily injury. And the evidence shows, Your Honor, that the officer was trying to withdraw his finger from the mouth.

THE COURT: Oh, I have no doubt that the act was unlawful. I haven't any doubt at all.

MR. CURTIN: Actually, the defendant continued to apply the force which resulted in the injury to the officer, and it was on that basis, Your Honor, that this section was charged. And it's the means that were used. The fact that he was using his teeth in such a vicious manner was the basis of the charge, and that the finger was badly lacerated and is still receiving treatment to this very day of trial.

MR. MORAN: There's one other point. I'm sure the Court has it in mind. The officer obviously initiated this situation by trying to recover something.

THE COURT: Yes. But I think he had a right to, Mr. Moran. I think under the circumstances he had a right to try and prevent him from destroying evidence.

MR. MORAN: Let's assume that.

THE COURT: Yes. I think that he was responsible for his finger getting there.

MR. MORAN: Getting in the mouth.

THE COURT: Right.

[fol. 299] MR. MORAN: That's right. I mean, it isn't a situation where the defendant went after him and grabbed his hand and said, "I'm going to cause great bodily harm."

THE COURT: I think after it happened, I think that Mr. Cooper bit down on it and I think he did it with the intention of hurting the officer, and it's all part of a scuffle, melee or whatever you want to call it.

MR. MORAN: I think that's exactly it. There were a number of officers around, and a great to-do resulted. I can't see the essential intent.

THE COURT: Well, my feeling is that the second count—If you want to submit any authorities or want to argue it further, I'll listen to you, of course, but I think on the second count I would find him guilty of the lesser and included offense of simple assault.

Under the circumstances here, I think I have to be pretty technical to find him guilty of a felony. Peculiarly

enough, the defendant in these circumstances is rather in a defensive attitude at the time that the thing happened. Of course, even if that's true, where the person defends himself, if he becomes an aggressor he then violates the law, too. I think that's what happened here.

Well, that will be the finding. The Court will find the defendant guilty of assault, a lesser and included offense [fol. 300] to that charged in the second count of the indictment.

How about a time for receiving the report and pronouncement of judgment, gentlemen? Can you agree on a date?

MR. CURTIN: Whatever is suitable for Mr. Moran.

THE COURT: Would a Monday afternoon be all right? As you know, I have the juvenile calendar on Monday mornings.

MR. CURTIN: Yes, that's fine with the People.

THE COURT: Would a Monday afternoon be agreeable?

MR. MORAN: Yes, it would be.

THE COURT: I guess it would probably be the 7th before we could get a report, wouldn't it? That's beyond the statutory time.

Would you waive it, Mr. Moran?

MR. MORAN: I'm sorry—

THE COURT: I think the 7th would probably be the earliest we can get a report from the probation officer. That's beyond the statutory time. Would you waive it?

MR. MORAN: That's satisfactory.

THE COURT: Is that date agreeable?

MR. MORAN: Yes.

THE COURT: All right. The matter will be referred to the probation officer for a report and recommendation to the Court, and the Court will fix May the 7th, 1962 at [fol. 301] the hour of 1:30 p.m. as the time for receiving the report of the probation officer and the pronouncement of judgment.

MR. CURTIN: Thank you.

THE COURT: The defendant is in custody, I take it.

MR. CURTIN: Yes, Your Honor.

THE COURT: He will be remanded to the custody of the sheriff.



[fol. 302]

IN THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA IN AND FOR THE COUNTY OF  
CONTRA COSTA

No. 7744

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

—vs—

JOE COOPER, DEFENDANT

REPORT AND RECOMMENDATION OF PROBATION  
OFFICER, JUDGMENT, AND SENTENCE.

Before Hon. Norman A. Gregg, Judge of the Superior  
Court, County of Contra Costa, State of California,  
Dept. No. 4, May 7th, 1962.

APPEARANCES:

JOHN A. NEJEDLY, District Attorney, Contra Costa  
County,  
Hall of Records, Martinez, California,  
By: MATTHEW S. WALKER, Deputy District Attor-  
ney;

Attorney for the People;

ROBERT H. MORAN, Attorney at Law,  
Financial Center Building,  
Oakland, California,  
Attorney for the Defendant.

[fol. 302a]

MAY 7, 1962

PROCEEDINGS

MR. WALKER: If the Court please, Action 7744, Peo-  
ple of the State of California against Joe Cooper.

May the record show that the defendant is present in  
court together with his attorney, Mr. Robert H. Moran?

**THE COURT:** The record may so show.

**MR. WALKER:** This is the time and place set for hearing the report and recommendation of the Probation Department in this matter, Your Honor, and for sentencing.

**THE COURT:** Have you received a copy of the report, Mr. Moran?

**MR. MORAN:** Yes, I have, and the defendant has, also.

**MR. WALKER:** If the Court please, I believe this report is in error in one respect. This states that there was a jury trial. I believe it was waived and there was a Court trial, if I am not mistaken.

**THE COURT:** Yes, it was.

**MR. WALKER:** May we amend, then, the probation report in that respect to reflect that it was a court trial rather than a jury trial.

**THE COURT:** Where does it state that?

**MR. WALKER:** It says, "Guilty by jury trial" in the probation report.

**PROBATION OFFICER:** Bottom of page four, Your Honor, evaluation. Next to the last line. It should be [fol. 303] "a court trial."

**THE COURT:** Oh, yes. Well, I don't think it need be amended. The fact is, it was a Court trial.

Do you have any comment to make, either on the facts stated therein or the recommendation, Mr. Moran?

**MR. MORAN:** No, I haven't, Your Honor.

**THE COURT:** Mr. Walker.

**DEFENDANT COOPER:** Your Honor, I'd like to interrupt, please.

**THE COURT:** Mr. Cooper.

**DEFENDANT COOPER:** Your Honor, I feel that it would have showed a better picture on both sides of this case, Your Honor, if I had been granted the opportunity to present my witness as well as, so the District Attorney did—if I had as well so as the Prosecuting Attorney had. I had witnesses, Your Honor, been put in ever since this case has been arranged. I feel like if I was granted the opportunity to present my witness that it will show a clearer picture, Your Honor, on both sides of the case.

And I feel like that I had a lack of due process of law, Your Honor. And I feel like that if—it's more facts—is connected in this case, Your Honor, that I would like to have been brought out, and maybe it would have been a better judgment. You could analyze and seeing it better.

But if I was granted, Your Honor, the opportunity to present my witness and I was found unwillingly, Your [fol. 304] Honor for the Court to incarcerate me for the rest of my life with hard labor in order to prove, Your Honor, that I would be willing to pay by debt to society from the beginning to the end, Your Honor, I'd rather be incarcerated for the rest of my life and punished with free hard labor from the sweats of my brow from the beginning to the end. I'd be willing to pay my debt to them if I was found otherwise.

THE COURT: Well, you had the opportunity to present any witnesses you wanted to, Mr. Cooper. I assume that Mr. Moran exercised his judgment in deciding which ones to present and which ones not to present. Mr. Moran is a very able and experienced lawyer. I assumed that he exercised his discretion properly.

DEFENDANT COOPER: But he taken the case a little late, Your Honor, and whether he seen that the witness' names and address, but I brought them over, Your Honor, and I consulted him the last day of the trial—if I could contact my witness, he said, "The Judge won't go for it because we don't have time." That's when we was back in the jury room talking. I said, "Well, I would like to ask him if he would allow me to present my witnesses the same as the Prosecuting Attorney had."

THE COURT: Well Mr. Cooper, I think you were very ably represented in this matter, and the record will show that you were very able represented. If unless, I may say so, the Federal Agents, State Agents and the [fol. 305] Richmond Police and all out there who testified as to what happened are called complete falsifiers, or are completely mistaken, I don't know what witnesses could have been produced that you are referring to.

DEFENDANT COOPER: Well, the thing about it, Your Honor, I had witnesses, I had five or six witnesses

that was there and they was willing to testify and come up and volunteer to give free testimony in this case. So I feel like that I should have been—entitled to subpoena them and had them there, which their names and addresses were given at the beginning, but Mr. Moran, after the case was moved from Mr. West over to Mr. Moran, he taken at little rate. But I don't know whether he subpoenaed them or made an effort to. However, I consulted him in the jury room about that.

MR. MORAN: If the Court please, so the record won't be confused, I had a number of conversations with Mr. Cooper that commenced in January of this year, and the availability of witnesses was discussed at that time, and subsequently—

THE COURT: Mr. Moran, it was not the Court's intention to flatter you. I think he was very ably represented. I think the transcript will show that.

Do you have any comments at all to make, Mr. Walker?

MR. WALKER: No, we will stand on the record in this matter, Your Honor. The court process was available [fol. 306] to the defendant at all times.

THE COURT: All right. Let the record show that the defendant was convicted of a violation of Section 11,500 of the Health and Safety Code. This is the time fixed by the Court for receiving the report and the pronouncement of judgment.

It will be the order of the Court that probation be and the same is hereby denied.

Do you have any legal cause to show, Mr. Cooper, why judgment of the Court should not now be pronounced against you?

DEFENDANT COOPER: Well—Your Honor, no more than what I just got through—the point I was trying my best, to the best of my knowledge to explain to you about, that I was asking for the opportunity to present my witnesses, as well so the Prosecution had on their side. And I feel like, Your Honor, that I was lacking due process of law.

THE COURT: Well, all right. There being no legal cause why the judgment of the Court should not be pronounced, it is the judgment of this Court that the de-



fendant be punished for the offense of which he stands convicted by being incarcerated in the State Prison for the term prescribed by law on the violation of Section 11,501 of the Health and Safety Code, and by imprisonment in the County Jail for a period of one year on the assault count.

And it will be the further order of the Court that the [fol. 307] sentences on these two counts run concurrently with each other.

He was already on parole, gentlemen. Do either of you wish to be heard on whether the judgment herein should run concurrently or consecutively with the term he is now serving?

MR. MORAN: If the Court please, the sentence imposed will be substantial. I believe the Court has had the background on the matter for which he's been placed on parole. I think that certainly substantial justice would be done if the sentences ran together on the count.

THE COURT: Do you have any comments, Mr.—

MR. WALKER: Well, if the Court please, we can only reflect on the fact that this record as shown in the probation report here is pretty tremendous and we have prior convictions shown here. We feel that under these circumstances, that the sentence should be made consecutively, any sentence that he has to serve.

THE COURT: Well, the funny thing, Mr. Cooper—I hate to say this—but I don't—I don't think that you see two sides of the situation at all. You apparently don't feel that you owe anything to society at all in the way of working and behaving yourself. While a lot of these are merely records of suspicion and investigations, the fact remains that people don't get picked up all the time, don't get investigated for offenses unless, at the very least, the [fol. 308] company they keep or the things they're doing are such as to cast suspicion upon them. And I just don't—

DEFENDANT COOPER: It is mostly what you call, Your Honor, that's—like a row, investigation, like a row, picked up on suspicion.

THE COURT: Well, it isn't one place. It's Martinez, Oakland, Yuba City, Eureka, Los Angeles and all over.

Every place you get you're in an element where the police are looking down your neck.

DEFENDANT COOPER: Well, they wasn't necessarily looking down my neck, Your Honor. It was just like I said, sort of a dragnet. It was rows.

THE COURT: Well, I don't know what the balance of his term is, but as Mr. Moran has pointed out, the sentence on this offense is going to be a long one. And I rather feel it would just be gilding the lilly, Mr. Walker, to add it on, having in mind what the minimum sentence on this one is.

All right. It will be the further order of the Court that the judgment pronounced herein on both counts will run concurrently with the term the defendant is currently serving.

And in giving you this break, Mr. Cooper, I don't think you deserve it, but it would be my hope that someplace along the line you get the idea that society has been a lot better to you, really, than you deserve. And that includes your incarceration. The State has sent you a check dur-[fol. 309] ing the time you were on parole and even your disability came about due to your own misconduct. You have my sympathy, of course, but even that came about in connection with an accident in which you were charged with a crime.

All right, the defendant will be remanded to the custody of the Sheriff.

MR. MORAN: If the Court please, I don't know whether we can take it up at this time, but the defendant told me a few moments ago that he would like to take certain procedures for an appeal and review and so forth and that he wished time and an opportunity to secure other counsel—

THE COURT: Well—

MR. MORAN: I would make the motion that I be allowed to withdraw at this time.

THE COURT: Well, yes, I think so.

(The Court and Mr. Walker conferring)

THE COURT: Well, might I suggest this, Mr. Moran—perhaps I'm imposing on you, but he has ten days with—

in which to file a notification of appeal. If you don't have any objection, I'll type out the notice and you can sign it as his attorney. Or if you—If it doesn't make any difference to you, Mr. Cooper, I'll have it typed out and you can sign it yourself. No great formality is required. All you have to do is put the caption of it and say, "I hereby appeal from the judgment entered this date."

MR. WALKER: Yes. Apparently the maximum on [fol. 310] the assault, misdemeanor, is six months. That's not very important, perhaps, under all the circumstances. The judgment of one year in the County Jail will be ordered stricken, and on the assault count he will be ordered incarcerated in the County Jail for a period of six months.

MR. WALKER: Thank you.

THE COURT: Do you have any objection to signing it, Mr. Moran?

MR. MORAN: No, I don't.

THE COURT: Well, then, upon the signing of the notice of appeal, Mr. Moran will be discharged as attorney of record for the defendant.

[fol. 311]

[Reporter's Certificate to foregoing transcript omitted in printing]

[fol. 312]

Judge's Certificate to foregoing transcript omitted in printing]

[fol. 313]

1/CRIM. NO. 4233

IN THE DISTRICT COURT OF APPEAL OF THE  
STATE OF CALIFORNIA, FIRST APPELLATE  
DISTRICT, DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA,  
PLAINTIFF AND RESPONDENT

vs.

JOE NATHAN COOPER, DEFENDANT AND APPELLANT.

EXCERPTS FROM RESPONDENT'S BRIEF—  
Filed October 30, 1964.

\* \* \* \*

[fol. 314]

## II

EVEN ASSUMING THE SCRAP OF PAPER WAS  
ILLEGALLY SEIZED, ITS ADMISSION WAS NOT  
PREJUDICIAL ERROR

It has long been the law in California that the admission of illegally seized evidence in a trial will not require reversal unless the appellate court,

"[A]fter an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. . . ." Cal. Const. Art. VI, § 4½; *People v. Watson*, 46 Cal.2d 818, 836 (1956).

The reasoning behind such a rule was stated recently by Chief Justice Traynor in *People v. Parham*, 60 Cal.2d 378 (1963), *cert. denied*, 377 U.S. 945 (1964):

"Unlike involuntary confessions [which are treated as exceptions and in a class by themselves], other illegally obtained evidence may be, as in this case, only a relatively insignificant part of the total evidence and has no effect on the outcome of the trial. To require automatic reversal because of its admission



is to lose sight of the basic purpose of the exclusionary rule to deter unconstitutional methods of law enforcement. (Citations omitted) Unless we were to [fol. 315] take the unprecedented step of holding that the state must be penalized for violating a defendant's constitutional rights in securing evidence by conferring an immunity upon him (citation omitted), we must consider the deterrent effect of the exclusionary rule not as a penalty, but as derived from the principle that the state must not profit from its own wrong. (Citations omitted.) The state does not so profit when erroneously admitted evidence does not effect the result of the trial. . . ." 60 Cal.2d at 385-86.

The most recent affirmations of this rule may be found in *People v. Cruz* (Cal.Sup.Ct. Crim. No. 7985, October 29, 1964), and *People v. Burke, supra*, 61 A.C. 633 (1964).

The facts of the case at bar are strikingly similar to those in *Parham*, and compel the same result. In *Parham*, the illegally seized evidence was the masticated fragments of a pink check. In our case, the evidence (assuming without admitting that it was illegally seized) was a scrap of brown paper. The pink check in *Parham* was highly relevant since a similar pink check was used in each of three recent bank robberies. In our case, the brown paper was also highly relevant since it was of the same type used to wrap the two bindles of heroin sold to [fol. 316] the informer, and was also similar to the wrapping on the object Cooper jammed into his mouth and swallowed.

The third major similarity between the two cases is that the other evidence in *Parham* pointed overwhelmingly to the defendant's guilt, and the pink check was merely cumulative of other undisputed evidence in the record. The following summary of evidence demonstrates that the same may be said of the instant case:

1. State agents overheard a phone conversation between an informant and appellant in which the latter agreed to sell a "deuce," or two bindles of heroin, to the informer.

The informer was searched and provided with marked money.

2. Other agents who knew Cooper observed him leave his residence shortly after the phone call, take something from the trunk of his car, and drive off.

3. Six officers and the informer converged on the meeting place and saw Cooper drive up in the car observed earlier.

4. The informer approached the car and remained in conversation with Cooper for 2-3 minutes, observed continually by the six officers who were stationed at various points.

5. Cooper drove off and the informer, under constant surveillance, immediately returned to the agents' car where he handed over two bindles of heroin.

[fol. 317] 6. The informer had been searched before the buy at the police station, and was searched again immediately after turning over the heroin. The marked money which had been furnished him after the first search was not found.

7. About two hours later, five officers spotted Cooper's car and staked it out. Cooper returned and was apprehended as he started to enter it.

8. Immediately after being placed under arrest, Cooper leaned over, peered in the car window, and stated that marijuana was over the sun visor. When the officers stooped to look, he jerked one hand free, reached in a shirt pocket and placed a brown object fitting the description of the bindles of heroin in his mouth.

9. Cooper admitted to police that the object he swallowed was a marijuana cigarette wrapped in brown paper.

Petitioner argues that the case of *Fahy v. Connecticut*, 375 U.S. 85 (1963), somehow affects the rule stated in *Parham* and recently reaffirmed in the *Burke* and *Cruz* cases. However, in *Fahy*, the Supreme Court merely reversed the state court's conclusion that certain illegally seized evidence had not prejudicially affected the defendant's trial. Even though the Supreme Court was confronted directly with the issue of the constitutionality of the Connecticut "harmless error" rule, it avoided that

[fol. 318] issue expressly. Therefore, *Fahy* represents no more than an evidentiary review of a state court conviction,<sup>4</sup> and is limited to its facts.

We submit that there will be no "miscarriage of justice" in the case at bar, and that the judgment should be affirmed.

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<sup>4</sup> The four dissenting justices felt that even here the majority exceeded its proper appellate function, since there was some substantial evidence in the record in support of the judgment.

[fol. 319]

IN THE DISTRICT COURT OF APPEAL OF THE  
STATE OF CALIFORNIA, FIRST APPELLATE  
DISTRICT, DIVISION ONE

1 Criminal 4233

THE PEOPLE OF THE STATE OF CALIFORNIA,  
PLAINTIFF AND RESPONDENT

v.

JOE NATHAN COOPER, DEFENDANT AND APPELLANT

OPINION—May 24, 1965

Defendant was charged in an indictment with selling heroin (Health & Saf. Code § 11501) and in a second count with assault by means of force likely to produce great bodily injury. (Pen. Code § 245.) An amended indictment filed during the trial charged the above offenses and in addition charged two previous convictions of felonies. Defendant pleaded not guilty to each count of the indictment and amended indictment and admitted the two previous convictions. The court sitting without a jury found defendant guilty of violation of Health and Safety Code section 11501 as charged in count one of the amended indictment and of the lesser and included offense of simple assault as charged in count two of the amended indictment. Defendant appeals from the judgment of conviction.

On December 21, 1961 at about 5:30 or 6:00 a.m., one Frank Green was arrested in his hotel room in Richmond by state narcotic agents and a Richmond police officer for selling heroin. The officers then took Green to the Richmond Police Department where he was interrogated. He agreed to act as an informer. Green's person and clothing [fol. 320] were thoroughly searched at the time of his arrest and again at the police department at about noon of the same day.

After the second search was completed, Green was taken by state narcotic Agent Armenta and federal narcotic Agent Lee to a public telephone booth in downtown Rich-



mond. He had been furnished with \$20 in marked money. Green and Agent Armenta entered the phone booth together and the latter placed a twin phone as a listening apparatus on the receiving end of the telephone. Green thereupon dialed a number identified as that of defendant's residence. A woman answered and Green asked for defendant, "Joe." When "Joe" answered, Green said, "How about a deuce?" "Joe" said "Yes." Green suggested that they meet at "Newell's," and then the two agreed to meet three right away. Armenta testified that he recognized the voice of "Joe" as being that of defendant. He also testified that in the narcotic traffic the word "deuce" is used in referring to bindles or capsules of heroin. The parties are in agreement that the telephone call took place between 12:30 and 1 p.m. on December 21.

On this date defendant lived with his aunt Mrs. Leona Gulley at 536 South 20th Street in Richmond. Louis Stumpf, a Richmond police officer assigned to the vice detail and one of the officers who had arrested Green early that morning, together with state narcotic Agent Yates, had defendant's residence under surveillance during the time the above telephone conversation was taking place. Stumpf and Yates were in a car on 19th Street just north of Cutting Blvd. and could see defendant's house on 20th Street across the intervening corners which had no structures on them. Stumpf had observed defendant prior to this date and testified that he knew defendant when he [fol. 321] saw him. At about 12:50 p.m., the officer "saw a person that fit the description" of defendant leave defendant's house, walk to a blue 1957 Oldsmobile parked in front, open the trunk of the car, stand at the rear of the car for two or three minutes, then enter the car and drive north to Cutting, east to 22nd Street and then south on 22nd Street.

Newell's Market was located on the corner of 23rd and Cutting. Adjacent to it on the west side, extending westerly along Cutting for the rest of the block to 22nd Street, was a large parking lot. After Green completed the telephone call, Agents Armenta and Lee took him to the vicinity of the market and dropped him off at 23rd and Virginia Streets, just one block north of the market. Armenta left the vehicle a short distance away. Both men

then proceeded to the front of Newell's Market, Green approaching it on the west side of 23rd Street and Armenta on the east side, eventually crossing both Cutting and 23rd Street to the front of the market, which was located on the southwest corner. All during this time Armenta had Green in plain sight and observed that the latter contacted no persons.

Armenta then saw Green walk into the parking lot, saw defendant alone in a 1957 blue Oldsmobile drive into the parking lot from 22nd and Cutting, lost sight of Green for about two or three minutes, and then saw him emerge from the lot and return to the vicinity of 23rd and Virginia Streets where Agent Lee was waiting. According to Armenta, Green was in the parking lot about five minutes all together and after defendant's car entered the lot it was "Just a couple of minutes, one or two" before Green walked out.

[fol. 322] While Armenta was standing in front of the market he observed state narcotic Agent Howard Groom, who, along with Lieutenant Sullivan of the Richmond Police Department, had taken a position in a service station on the northeast corner of 23rd and Cutting, diagonally across from the market. Armenta, from his position in front of the market, saw Groom leave the service station, cross 23rd Street, and proceed to a vantage point on the north side of Cutting opposite Armenta, where Groom could see the parking area.

Groom and Sullivan had observed Green and Armenta making the telephone call and then in a separate car had accompanied them to Newell's Market. They parked in the service station and watched both Armenta and Green approach the market. Groom testified that he then left the service station, crossed 23rd Street and stood on the porch of a house fronting on 22nd Street, from which position he had a clear view of the entire front of the market and of the easterly half of the parking lot. He stated that he could see Agent Armenta and Green at all times and he continued to watch Green. After a short time Green walked out into the parking lot from a position close to the wall of the building. At this point, Groom left the porch of the house and took another position alongside the house where he had a view of the entire

parking lot. He then saw Green "go up to the Oldsmobile, which I recognized as the car that Joe Cooper usually drove, and talk to a man in that car who appeared to me to be Joe Cooper." Green stood by the driver's side of the car for a minute or so and then walked out of the lot and up 23rd Street to Virginia. Groom kept him in sight all the time until he saw Green coming into Agent Lee's view. [fol. 323] Lieutenant Sullivan generally confirmed the activities of Armenta, Green and Groom at Newell's Market. Sullivan, who was parked in the service station, received a radio call from Agent Yates who had seen defendant leave his house. After receiving the message, Sullivan saw the 1957 Oldsmobile pull into the parking lot, saw Green walk over to it and sit in the front seat with the driver for a few minutes and then saw Green walk back toward 23rd Street. He testified that there was only one person in the car when it entered the lot and that "It appeared to me to be Joe Cooper." Sullivan had seen Cooper in a vehicle about two weeks previously. During all of the time Sullivan had Green under surveillance he did not see him contact or communicate with anyone other than defendant.

When Green returned to Agent Lee's car, he handed Lee, in Armenta's presence, a small package and the group thereupon returned to the Richmond Police Department. The package consisted of two white paper bindles of heroin wrapped in brown wrapping paper apparently from a grocery sack. Groom and Sullivan also returned there. A field test was made on the contents of the package, indicating that the substance was possibly an opium derivative. After the test was made the officers attempted to locate defendant's car.

Eventually Agent Groom, federal Agents Yates and Lee and Richmond Police Officers Stumpf and Billingsley participated in placing defendant under arrest. The blue Oldsmobile was finally located at 7th and MacDonald in Richmond at 2:15 p.m. on December 21 and kept under surveillance until about 3:45 p.m. when defendant walked toward the car with a woman and two children. As de-[fol. 324] fendant started to unlock the car door Groom and Yates closed in on him and placed him under arrest. Groom grabbed defendant's right wrist and defendant mo-

tioned and said, "It's there in the car over the sun visor." When asked what was there, defendant bent down and said, "The marijuana cigarettes. . . . But I didn't put them there, someone else put them there."

At this point defendant put his left hand into his right shirt pocket, removed an object wrapped in brown paper and started to put it in his mouth. Both Groom and Yates grabbed defendant's left arm: Groom grabbed the hand, whereupon both hand and package went into defendant's mouth and were stubbornly chewed by defendant. Groom grabbed defendant by the nose, shouted in pain to Cooper to let go of his finger, and after a scuffle, managed to pull his finger out of defendant's mouth. An attempt was made to get defendant to open his mouth while he was still chewing away, but defendant had apparently swallowed whatever had been in his mouth. Defendant was pressed against the hood of the car, placed in handcuffs and taken as a state prisoner to the police station.

Defendant's Oldsmobile was seized and taken into state custody. The car, defendant and his woman companion were searched but the marked money furnished Green was not found. No heroin was found in the car, on defendant's person or in his clothing, or in his room at his home on South 20th Street, which was subsequently searched. Defendant was interrogated at the police station on the day following his arrest. We discuss this matter *infra*.

About a week after defendant's arrest, Agent Groom searched the Oldsmobile at the Beacon Tow Service in [fol. 325] Richmond and found in the glove compartment a piece of brown paper, somewhat larger than the brown paper in which the bindles of heroin were wrapped. This piece of paper, which was about  $2\frac{3}{4}$  inches by  $4\frac{1}{2}$  inches and appears to be a torn piece of an ordinary brown grocery bag, was admitted in evidence over defendant's objection. On April 4, 1962, Agent Groom made another search of defendant's car at a San Francisco garage where it was then impounded and found one marijuana seed wedged beneath the carpeting on the passenger's side of the car. Defendant's motion to strike Groom's testimony pertaining to the discovery of the seed was denied. The seed itself was received in evidence without objection.



Green, the informer, did not testify. Defendant took the stand in his own behalf and in fact was the sole defense witness. Defendant denied that he sold heroin to Green at Newell's Market, that he met Green there on December 21 or any other day or that he was at the market at any time on December 21. He also denied that on December 21 or any other date he received a telephone call from Green in which the latter suggested that defendant meet him at Newell's Market. Nor did Green at any time call or see him in order to ask for a "deuce," an expression which defendant said was meaningless to him. According to defendant, he was not at home at the time the telephone call in question was made.

Defendant, through his court appointed counsel, contends that his conviction for selling heroin as charged in count one of the indictment must be reversed because (a) illegally seized evidence admitted at the trial contributed to the conviction and (b) at the critical time of the alleged [fol. 326] meeting with the informer, defendant, if he was present, was not represented by counsel although the prosecution had then focused accusatory process on him. He also contends that his conviction for assault under count two must be reversed because (a) he was entitled to use reasonable means to protect himself from a violation of his constitutional right not to have material forcibly extracted from his mouth and (b) an incriminating statement made by him while he was being interrogated without counsel was admitted in evidence. We propose to consider these contentions in the order presented. We will thereafter discuss certain additional arguments urged in a separate opening brief filed herein by defendant in propria persona.<sup>1</sup>

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<sup>1</sup> On May 21, 1963, defendant's retained counsel having withdrawn with defendant's consent, we appointed counsel for defendant on appeal. On June 18, 1963, on the request of said counsel, we vacated his appointment and on October 10, 1963, we appointed another counsel for defendant. On April 16, 1964, we vacated this second appointment and on May 11, 1964, appointed Michael Traynor, Esq., his present counsel, to represent defendant on appeal. Mr. Traynor did not represent defendant at trial. Defendant's opening brief in propria persona was filed herein on September 18, 1963.

# 1. *The sale of heroin.*

## (a) Illegal search and seizure.

Defendant contends that the search of his automobile by Agent Groom at the Beacon Tow Service a week after his arrest was illegal and that the piece of brown paper taken in the course thereof from the glove compartment was illegally seized. It does not appear, nor do the People claim, that Groom had a search warrant on the occasion referred to and, in the absence of such a showing, we must conclude that he did not have one. (*People v. Burke* (1964) 61 Cal. 2d 575, 578.) The Attorney General also [fol. 327] concedes that he does not seek to uphold the legality of the search on the ground that it was made incidental to defendant's arrest. (See *People v. Ingle* (1960) 53 Cal. 2d 407, 412-413; *People v. Hammond* (1960) 54 Cal. 2d 846, 853; *People v. Torres* (1961) 56 Cal. 2d 864, 866.) Indeed, it seems clear that no such claim could be properly made. (*People v. Burke*, supra, 61 Cal. 2d 575, 579; *Preston v. United States* (1964) 376 U.S. 364, 366-367.)

The Attorney General asserts that the search and seizure were lawful because at the time title to the car had vested in the state. His argument runs as follows: Health and Safety Code section 11611<sup>2</sup> requires any state peace officer, upon making an arrest for a narcotics violation, to seize any vehicle used to unlawfully transport, keep or conceal any narcotic to facilitate its possession by an occupant thereof and to immediately deliver such vehicle to the Division of Narcotic Enforcement to be held as evi-

<sup>2</sup> Section 11611 provides: "Any peace officer of this State, upon making or attempting to make an arrest for a violation of this division, shall seize any vehicle used to unlawfully transport any narcotic or to facilitate the unlawful transportation of any narcotic, or in which any narcotic is unlawfully kept, deposited or concealed or which is used to facilitate the unlawful keeping, depositing or concealment of any narcotic, or in which any narcotic is unlawfully possessed by an occupant thereof, or which is used to facilitate the unlawful possession of a narcotic by an occupant thereof, and shall immediately deliver such vehicle to the Division of Narcotic Enforcement of the Department of Justice to be held as evidence until a forfeiture has been declared or a release ordered."

dence in a later forfeiture proceeding. (See Health & Saf. [fol. 328] Code § 11610.<sup>3</sup>) At the time defendant was arrested and his car seized, there was "overwhelming" evidence constituting "ample cause" for the officers to believe that defendant had violated the narcotics laws and had "unlawfully transported" or "concealed" narcotics in the car. When the car was seized "a proceeding independent from the criminal action was set into motion" and title, though inchoate, vested in the state at the time of the prohibited act. Under the authority of *People v. Broad* (1932) 216 Cal. 1, 4 and *People v. One 1953 Buick* (1962) 57 Cal. 2d 358, 364-365, subsequent final judicial determination of forfeiture merely "dates back" to the commission of the offense. Therefore, such reasoning concludes, since title to the car was properly in the state, its Agent Groom had the right to search it. This conclusion, the People argue, is further buttressed by *Burge v. United States* (9th Cir. 1964) 333 F. 2d 210.

We are not persuaded by the argument. In the first place, the instant record nowhere discloses that forfeiture proceedings were instituted in respect to defendant's car, much less that there was a judgment declaring the car forfeited to the state. Even under the People's cited cases, the title which they invoke depends upon a judicial determination of forfeiture and does not relate back to the time of seizure of the car until *after* such determination. (*People v. Broad*, supra, 216 Cal. 1, 4; *People v. One 1953 Buick*, supra, 57 Cal. 2d 358, 364-365.) The requisite judicial determination is not revealed in this record. At oral argument and in a subsequent letter filed herein, the Attorney General advised us that a judgment of forfeiture of defendant's car was entered on the day following the termination of defendant's trial and invited us to take [fol. 329] judicial notice of such judgment and presum-

<sup>3</sup> Section 11610 provides: "The interest of any registered owner of a vehicle used to unlawfully transport or facilitate the unlawful transportation of any narcotic, or in which any narcotic is unlawfully kept, deposited, or concealed or which is used to facilitate the unlawful keeping, depositing or concealment of any narcotic, or in which any narcotic is unlawfully possessed by an occupant thereof or which is used to facilitate the unlawful possession of any narcotic by an occupant thereof, shall be forfeited to the State."

ably of its antecedent proceedings, all separate from those of the instant case. We decline to do so. The judgment referred to was not in existence at the time of defendant's trial and therefore neither could have been, nor was it, availed of by the People to prove the legal basis now asserted for the search of the car. It is true that judicial notice is a kind of evidence which may be relied on to support a judgment or ruling. (Code Civ. Proc. § 1827, subd. 1; *Estate of Fawcett* (1965) 232 A.C.A. 925, 937.) Even assuming that this evidence would have the effect desired by the People under their theory of relation back, the simple fact is that no such evidence existed at the time of defendant's trial so as to furnish such proof.

Although the main thrust of the People's argument is that under a theory of relation back title was vested in the state at the time of the search, thereby justifying the search and distinguishing this case from *People v. Burke*, supra, 61 Cal. 2d 575 and *Preston v. United States*, supra, 376 U.S. 364, the Attorney General also seems to argue that independent of any theory of "vested title," a legal basis for the search can be found in Health and Safety Code section 11611 (see fn. 2, *ante*). The gist of this claim is this: that the section is a mandate to narcotic officers not only to *seize* and *deliver* (to the Division of Narcotic Enforcement) a vehicle but also to determine whether narcotics were unlawfully "kept, deposited or concealed" therein and therefore to search the car. Aside from his reliance on *Burge v. United States*, supra, 333 F. 2d 210, the Attorney General has referred us to no case, nor has any been found, holding that section 11611 [fol. 330] invests state officers with such authority. Nor has he furnished us with any analysis supporting such conclusion as being within the intended scope of the section. Nor does he rely on the line of authority<sup>4</sup> noted *infra* holding that where officers have lawful custody of a car, articles found therein are also lawfully in their possession without the occurrence of any new seizure.

Both *Preston* and *Burke* held that a search of an automobile made without a warrant but *not* incidental to a lawful arrest failed to meet constitutional standards of

<sup>4</sup> See fn. 5, *infra*.



reasonableness and that the evidence obtained as a result thereof was inadmissible. In both cases the interdicted search was made on the *same day* as the arrest—in *Preston* “soon after” defendants had been booked, in *Burke* no later than eleven hours after defendant was arrested. In *Burke*, the court held that Vehicle Code section 22651 subdivision (h) and related section 22850 authorizing the removal and impounding of defendant’s car “do not purport to authorize the making of a search.” (61 Cal. 2d at p. 580.) In both cases the automobiles were in lawful custody of the police and in *Burke* there was further statutory support therefor. (Veh. Code §§ 22651, subd. (h), 22850.)

In the instant case, as in both of the above cases, the automobile was in lawful custody of the officers at the time of the search in question, at least under Health and Safety Code section 11611, if not on other grounds. Here the Attorney General concedes that the search of the car made *one week* after defendant’s arrest was not incidental to defendant’s arrest but at the same time, as was done [fol. 331] in *Burke*, invokes statutory authority for the search. In this case the justification is sought in Health and Safety Code section 11611, rather than in Vehicle Code section 22651. Contrary to the claim of the Attorney General, there is no language in section 11611 expressly authorizing, let alone commanding, the search of an automobile for additional evidence that narcotics were “unlawfully kept, deposited or concealed” therein. It has been held that the provisions of the section are merely directory. (*People v. One 1951 Chevrolet* (1958) 157 Cal. App. 2d 301, 305.) Obviously the statute relied upon is part of the enforcement procedure established for the forfeiture of vehicles (Health & Saf. Code §§ 11610-11629). As previously pointed out, it provides for the seizure, delivery and holding for evidence of such vehicles. Absent clear and express language authorizing search, we are not disposed to find therein by implication authority to make a warrantless search and on such a slender and frail basis to sweep aside defendant’s vital Fourth Amendment rights. As we see it, the philosophy of *Preston* and *Burke* is that lawful custody of an automobile does not of itself dispense with constitutional requirements of search-

es thereafter made of it.<sup>6</sup> We are therefore not persuaded by *Burge v. United States*, supra, 333 F. 2d 210, relied on by the People, which though decided after *Preston* fails to mention that case<sup>6</sup> and which apart from that consideration is not binding on us in any event even on a federal question. (*Stock v. Plunkett* (1919) 181 Cal. 193, 194-195.)

We therefore hold that the search of defendant's car by Groom was illegal and the evidence obtained as a result therefore, consisting of the piece of brown paper, was inadmissible. (*Mapp v. Ohio* (1961) 367 U.S. 643, 655.)

Can defendant now urge on appeal the inadmissibility of the brown paper found in the glove compartment? The paper in question was part of the same exhibit (People's #4) with the two bindles of heroin and the brown piece

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<sup>6</sup> *Burke* does not discuss, much less express disapproval, of a line of authority holding that, where an automobile is lawfully in the custody of the police, articles contained therein are also in their possession so that any subsequent search of the automobile does not constitute a new seizure of its contents. (See *People v. Ortiz* (1956) 147 Cal. App. 2d 248, 251; *People v. Simpson* (1959) 170 Cal. App. 2d 524, 530; *People v. Nebbitt* (1960) 183 Cal. App. 2d 452, 460-461; *People v. Myles* (1961) 189 Cal. App. 2d 42, 48, cert. denied 371 U.S. 872; *People v. Odegard* (1962) 203 Cal. App. 2d 427, 432; *People v. Garcia* (1963) 214 Cal. App. 2d 681, 684-685; but see *People v. Garrison* (1961) 189 Cal. App. 2d 549, 555-556.) In almost all of the above cases the search was made for the purpose of making an inventory of the contents of the car preliminarily to impounding it, and in any event reasonably contemporaneously with the arrest of its driver. (See *People v. Ortiz*, supra; *People v. Simpson*, supra; *People v. Nebbitt*, supra; *People v. Myles*, supra; *People v. Garcia*, supra.) In *People v. Odegard*, supra, the search was not made in the course of impounding the car but two days after the car was impounded and its occupants arrested. We can only speculate that the court in *Burke* did not expressly disapprove these cases because in the main they equate inventoring preliminary to impounding with reasonable search. Nevertheless we feel that the holding in *Burke*, though containing no express disapproval of these cases, is in conflict with the broad statements found therein to the effect that a search of a lawfully impounded vehicle is reasonable because the police *ipso facto* have possession of all its contents and require no search warrant to uncover and seize them.

<sup>6</sup> *Preston* was decided March 23, 1964 and *Burge* on May 29, 1964.

of paper in which the bindles were wrapped.' People's Exhibit No. 4 for identification was thereafter offered in evidence during the testimony of prosecution witness Hil-[fol. 333] lard M. Reeves, a criminalist for the Richmond Police Department. At that time, as defendant here concedes, the only objection interposed was that "a proper chain of possession" had not been established in respect to the entire exhibit. The objection was overruled. The Attorney General now contends that by failing to object at trial that the piece of brown paper was inadmissible as the product of an illegal search, defendant is precluded from asserting such objection here.

It is well established that a defendant, who fails to object at the trial to the admission of evidence on the ground that it was obtained by an unlawful search and seizure, may not raise the question for the first time on appeal. (People v. Richardson (1959) 51 Cal. 2d 445, 447; People v. Hyde (1958) 51 Cal. 2d 152, 157; People v. Hunter (1963) 218 Cal. App. 2d 385, 394; People v. Gurrola (1963) 218 Cal. App. 2d 349, 354; see generally 3 Cal. Jur. 2d, § 140, p. 604; Witkin, Cal. Evidence, § 700, p. 732.)

However in People v. Kitchens (1956) 46 Cal. 2d 260, 262-263, where the trial was had before the decision in People v. Cahan (1955) 44 Cal. 2d 434, the court said: "Although we adhere to the rule that ordinarily the admissibility of evidence will not be reviewed on appeal in the absence of a proper objection in the trial court, we conclude that it is not applicable to appeals based on the admission of illegally obtained evidence in cases that were tried before the Cahan decision. This practice was adopted by the federal courts following the decision of the United States Supreme Court in McNabb v. United States, 318 U.S. 332 [63 S.Ct. 608, 87 L.Ed. 819], holding confessions obtained during a period of illegal detention inad-

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\* The record shows that when this exhibit was first marked for identification only, during the first part of the testimony of the witness Groom, it embraced only the last three objects. Later on in his testimony, Groom referred to the paper from the glove compartment which had been made part of the same exhibit for identification.

[fol. 334] missible even if voluntarily made. [Citations.] A contrary holding would place an unreasonable burden on defendants to anticipate unforeseen changes in the law and encourage fruitless objections in other situations where defendants might hope that an established rule of evidence would be changed on appeal. Moreover, in view of the decisions of this court prior to *People v. Cahan*, supra, an objection would have been futile, and "The law neither does nor requires idle acts." (Civ. Cod, § 3532.)"

We observe that the case at bench was tried in April 1962 and therefor before the decision of *People v. Burke*, supra, 61 Cal. 2d 575 on July 30, 1964. Applying the rationale of *Kitchens*, we conclude that the general rule of appellate review should not be made applicable here since defendant could not have anticipated the change in the law in respect to searches of impounded automobiles in the lawful custody of the authorities and since we think any objection he would have made would have been futile in view of the prior decisions of appellate courts (see fn. 5, ante) holding in effect that legal custody of the car imparted legal possession of the contents.

Nevertheless, although we are of the view that the admission in evidence of the piece of brown paper was error which defendant is entitled to assert on appeal, we have concluded that such error was not sufficiently prejudicial under either test of prejudice urged by defendant to require a reversal.

Defendant argues that there was not only a reasonable possibility but also a reasonable probability that the piece of paper contributed to his conviction. In support of this [fol. 335] argument he underscores the following alleged "weaknesses" in the evidence against him: The unreliability of the informer Green; the failure to search the telephone booth; the failure to find the marked money; the conflict in the testimony of Groom and Sullivan as to Green's position at the Oldsmobile; the testimony of the agents that the person in the Oldsmobile "appeared to be" defendant; and the failure to discover any other heroin on defendant's person or in his car or residence.

The record before us shows that defendant was tried and convicted for selling heroin to Green at Newell's Market on December 21, 1961. Contrary to defendant's ap-



parent claim, this is not a case where defendant was arrested upon information received from an informant and the reliability of the informant is in issue. (See *Willson v. Superior Court* (1956) 46 Cal. 2d 291, 294-295; *People v. Bates* (1958) 163 Cal. App. 2d 847, 851; *People v. Burke* (1962) 208 Cal. App. 2d 149, 155-156.) Here the evidence set forth in detail by us at the beginning of this opinion establishes the sale by sufficient circumstantial evidence based upon an adequate presale search of the informant followed by a continuous visual observation of him by the officers as a group between the time of said presale search and the time of the ultimate delivery of the heroin by him to the officers after the sale, thereby eliminating any "gap" in the surveillance and any claim of his contact with any person other than defendant. (*People v. Basler* (1963) 217 Cal. App. 2d 389, 394-397; *People v. Robison* (1961) 193 Cal. App. 2d 410, 411-412; *People v. Givens* (1961) 191 Cal. App. 2d 834, 838; *People v. Wilkins* (1960) 178 Cal. App. 2d 242, 245.) This [fol. 336] chain of circumstances has its own factual integrity. It effectively linked defendant to the heroin admitted in evidence and did not require as one of its links the brown piece of paper here in dispute. After an examination of the entire cause, including the evidence, it does not appear to be us to be reasonably probable that a result more favorable to defendant would have been reached in the absence of the above error. We cannot say there has been a miscarriage of justice. (*People v. Watson* (1956) 46 Cal. 2d 818, 836.) Nor, assuming without deciding that, as defendant would have it, we are called upon to inquire whether "there is a reasonable possibility that the evidence complained of might have contributed to the conviction" (*Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87), are we of the opinion that such reasonable possibility here exists. Indeed, in the light of the entire record, including the compelling characteristics of the sale and presale search, we are at a loss to understand what actual probative value this piece of an ordinary paper bag could possibly have, there being no testimony establishing that it was a piece of the same paper in which the heroin was wrapped.

(b) Defendant's right to counsel.

Defendant makes the unique claim that his conviction must be reversed because, if he was present at the time of the sale of heroin, he was not there represented by counsel, citing *Escobedo v. Illinois* (1964) 378 U.S. 478 and *Massiah v. United States* (1964) 377 U.S. 201. Neither case is here applicable. At the time of the sale defendant was neither in custody (*Escobedo*) nor under indictment (*Massiah*).

[fol. 337] 2. *The assault.*

Defendant contends that his act of biting Agent Groom's finger was not unlawful since Groom was violating defendant's constitutional rights by trying to forcibly extract material from defendant's mouth and defendant therefore could use reasonable means to forestall such violation.

This contention is essentially one that the evidence is insufficient to support the verdict. However, the evidence viewed as it must be in the light favorable to the People does not show that Agent Groom deliberately put his finger in defendant's mouth. Groom's testimony definitely states that he tried to grab defendant's hand in order to prevent the latter from putting the package in his mouth and that defendant thereupon "forced my finger in with the package and everything went in together." The trier of fact was warranted in concluding that this was an involuntary act on Groom's part and the subsequent chewing of the finger was a wilful act on defendant's part. The evidence, thus viewed, does not establish that Groom was engaged in "conduct that shocks the conscience" (*Rochin v. California* (1952) 342 U.S. 165, 172) or was in the process of using brutal and shocking force upon defendant so as to compel the conclusion that defendant's rights were being violated. (See *People v. Martinez* (1954) 130 Cal. App. 2d 54, 56; *People v. Sevilla* (1961) 192 Cal. App. 2d 570, 574-575; *People v. Erickson* (1962) 210 Cal. App. 2d 177, 180-182.) Defendant's arguments to the contrary, including his claims that Groom's testimony is improbable, are more properly addressed to the trier of fact than to this court.

[fol. 338] We conclude that defendant's conviction of simple assault is supported by the evidence. His extrajudicial statement relating to his commission of this offense will be dealt with under the next heading.

### 3. *Defendant's incriminating statements.*

Defendant contends that the admission in evidence of an incriminating statement made by him in reference to his biting Agent Groom's finger constitutes reversible error under the rule announced in *Escobedo v. Illinois*, supra, 378 U.S. 478, and followed in *People v. Dorado* (1965) 62 A.C. 350. At oral argument our attention was directed to other incriminating statements to which these rules may have application.

We first set forth the pertinent facts. Defendant was interrogated on the day after his arrest in the vice office of the Richmond Police Department. Six officers, including Agent Groom, were present.

At the trial, Groom testified that at the above interrogation he asked defendant what the latter had put in his mouth when he was arrested and defendant replied that it was a marijuana cigarette. Groom then said that it didn't look like a marijuana cigarette and defendant replied that he had folded it in half. Groom then asked if he had it wrapped and defendant said it was wrapped in brown paper. According to Groom's testimony on cross and redirect examination, defendant later on in the same interview said that he had possibly swallowed some breath pills.

Groom further testified that during the same interview he said to defendant "You would have been better off if [fol. 339] you hadn't chewed my finger" and that defendant replied "that he was sorry, but he had heard about people getting choked and he thought that he might be getting choked."

In addition, as we have already pointed out, Groom in narrating defendant's arrest testified that when he first grabbed defendant's wrist the latter stated that there were marijuana cigarettes over the sun visor of the car but that he had not put them there.

Following the decision of the Supreme Court of the United States in *Escobedo v. Illinois*, supra, 378 U.S. 478,

the Supreme Court of California held in *People v. Dorado*, supra, 62 A.C. 350, 365-366, "that defendant's confession could not properly be introduced into evidence because (1) the investigation was no longer a general inquiry into an unsolved crime but had begun to focus on a particular suspect, (2) the suspect was in custody, (3) the authorities had carried out a process of interrogations that lent itself to eliciting incriminating statements, (4) the authorities had not effectively informed defendant of his right to counsel or of his absolute right to remain silent, and no evidence establishes that he had waived these rights."

In respect to the first statement by defendant that he was chewing a marijuana cigarette, we are satisfied that all of the conditions set forth in *Dorado* have been met and that the admission of such statement was error. At that time the investigation had focused on defendant and he was in custody, these two circumstances being encompassed by defendant's arrest. (*People v. Stewart* (1965) 62 A.C. 597, 603.) It is also clear from an analysis of [fol. 340] "the total situation which envelopes the questioning" (*People v. Stewart*, supra, at p. 605) that the officers were then carrying out "a process of interrogations that lent itself to eliciting incriminating statements." (*People v. Dorado*, supra, 62 A.C. 350, 365-366.) Finally, the record fails to show that defendant was advised of his right to counsel or of his absolute right to remain silent or that defendant waived these rights so that the fourth condition of the *Dorado* rule is satisfied. (*People v. Stewart*, supra, at p. 607.)

The foregoing statements obviously are not a confession of the crime charged (sale of heroin) and do not therefore constitute reversible error. (*People v. Dorado*, supra, 62 A.C. 350, 368; *People v. Finn* (1965) 232 A.C.A. 515, 519-522.) It is arguable that defendant's statement that the cigarette was wrapped in brown paper may have some relevancy as an admission since the heroin delivered earlier in the day by defendant to Green was wrapped in brown paper. We feel that to give this passing general reference to "brown" paper any significance is merely to indulge in speculation. The Attorney General makes no point of it. The balance of the statement is not "relative



to the offense" with which defendant was charged. (Cf. *People v. Atchley* (1959) 53 Cal. 2d 160, 170, appeal dismissed 366 U.S. 207.) The admission of these first statements was not prejudicial in the light of the entire record.

The other two statements set forth above do not fall within the *Dorado* rule. Defendant's reply to Groom in reference to "chewing" the latter's finger was not incriminating but merely an apology susceptible of inferences favorable rather than unfavorable to defendant. Defendant's statement in reference to marijuana cigarettes un- [fol. 341] der the sun visor was spontaneously made, before he was in custody and without any process of interrogation.

#### 4. *Defendant's additional contentions.*

We briefly dispose of certain other contentions made by defendant in his opening brief filed by him in propria persona. (See fn. 1, *ante*.)

First: Defendant claims that he was denied a fair trial because the court expressed an opinion of his guilt before the defense presented any evidence. The claim has no merit. Our examination of that portion of the record to which defendant refers indicates merely that the court, on denying defendant's motion for an acquittal at the conclusion of the prosecution's case in chief, observed that the People had made out a *prima facie* case.

Second: Defendant raises the lack of probable cause for his arrest on the grounds that Green was not a reliable informant. As we have already explained, defendant's arrest is not predicated on this basis.

Third: Defendant claims that the search of his room was illegal. In the first place, it was made with the consent of his aunt in whose house defendant lived. Furthermore no evidence produced by such search was introduced against defendant.

Fourth: It is also urged that his statements about marijuana made at the time of his arrest were coerced and infected by his illegal arrest. The record does not sustain the claim; moreover it shows that no objection was ever interposed. Finally, as we have explained, the arrest was legal.

[fol. 342] Fifth: He asserts that the prosecutor was guilty of prejudicial misconduct and bad faith during his cross-examination of defendant. Our examination of those portions of the record relied upon discloses no misconduct. Except in two instances, defendant made no objection to the questions he now criticizes. In one instance defendant's objection as to the competency, relevancy and materiality of the information sought was properly overruled. In the other instance, also embraced by defendant's complaint, his objection was sustained.

Sixth: Defendant claims that the trial court erred in receiving in evidence Agent Armenta's testimony as to the telephone conversation between Green and "Joe" which Armenta heard by the use of a listening device. It is urged that this evidence was obtained in violation of the Federal Communications Act (47 U.S.C. § 605) and Penal Code section, 640. The conversation was not intercepted by the authorities in violation of either of these two statutes because the interception was authorized and consented to by Green. (People v. Malotte (1956) 46 Cal. 2d 59, 64; Rathbun v. United States (1957) 355 U.S. 107, 109.)

Seventh: Defendant argues that his trial counsel was incompetent in conducting his defense so that he was denied proper representation at the trial. The record establishes that defendant was ably represented as indeed the court pointed out to defendant at the conclusion of the trial. The charge is groundless. (People v. Ford (1962) 200 Cal. App. 2d 905, 914.)

We have considered the other points raised by defendant [fol. 343] in his brief filed in propria persona and have concluded that they are without merit and need not be discussed in detail.

The judgment is affirmed.

-----  
SULLIVAN, P. J.

WE CONCUR:

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MOLINARI, J.

-----  
SIMS, J.

[fol. 344]

Order Due

July 23, 1965

IN THE SUPREME COURT OF  
THE STATE OF CALIFORNIA  
IN BANK

1st District, Division 1, Crim. No. 4233

[File Endorsement Omitted]

PEOPLE

v.

COOPER

ORDER DENYING HEARING  
AFTER JUDGMENT BY DISTRICT COURT OF APPEAL—  
Filed July 21, 1965

Traynor, C.J., did not participate.

Appellant's petition for hearing DENIED.

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 21st day of July A.D. 1965.

WILLIAM L. SULLIVAN, Clerk

By /s/ R. C. Matteoli  
Deputy Clerk

TOBRINER,  
Acting Chief Justice

[fol. 345]

SUPREME COURT OF THE UNITED STATES

No. 700 Misc., October Term, 1965

JOE NATHAN COOPER, PETITIONER

v.

CALIFORNIA

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN  
FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF  
CERTIORARI—April 18, 1966

On petition for writ of Certiorari to the Supreme Court of the State of California.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1224, placed on the summary calendar, and set for oral argument immediately following No. 1156.





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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 103

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JOE NATHAN COOPER,

*Petitioner,*

*vs.*

CALIFORNIA,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF CALIFORNIA

---

BRIEF FOR THE PETITIONER

---

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**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1966**

**No. 103**

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**JOE NATHAN COOPER,**

*Petitioner,*

*vs.*

**CALIFORNIA,**

*Respondent.*

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**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF CALIFORNIA**

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**BRIEF FOR THE PETITIONER**

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**Opinion Below**

The opinion of the District Court of Appeal (R. 257) and the order of the Supreme Court of California denying a hearing (R. 276) are reported at 234 Cal.App.2d 587 and 44 Cal.Rptr. 483.

**Jurisdiction**

The judgment of the District Court of Appeal was entered May 24, 1965. (R. 257.) The order of the Supreme Court of California denying a hearing was entered July 21, 1965. (R. 276.) The petition for a writ of certiorari

was filed September 20, 1965 and granted April 18, 1966. (R. 277); 384 U.S. 904. The jurisdiction of this Court rests on 28 U.S.C. §1257(3).

### Questions Presented

1. Did the California District Court of Appeal correctly hold that the piece of brown sack paper was seized unconstitutionally in a warrantless search of defendant's impounded car a week after his arrest and used unconstitutionally as evidence at petitioner's trial in violation of *Mapp v. Ohio*, 367 U.S. 643 (1961)?
2. Is there a reasonable possibility that the unconstitutionally seized piece of brown sack paper contributed to defendant's conviction?
3. Can the unconstitutional use in a criminal trial of unconstitutionally seized evidence be dismissed as only harmless error?
4. Was petitioner unconstitutionally denied his right of confrontation and cross-examination because the prosecution based its case on assertions and conduct of an unreliable and untrustworthy informer without producing the informer as a witness at the trial?

### Constitutional Provisions Involved

#### 1. *United States Constitution*

**Fourth Amendment:** "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated . . . ."



*Fifth Amendment:* "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

*Sixth Amendment:* "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

*Fourteenth Amendment:* "Nor shall any State deprive any person of life, liberty or property, without due process of law . . . ."

2. *California Constitution, Article VI, Section 4½*

"No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

**Statement**

About a week after defendant was arrested for allegedly selling two bindles of heroin to a police informer, a state narcotics agent made a warrantless search of defendant's car.<sup>1</sup> The search was made while the car was impounded.

<sup>1</sup> The District Court of Appeal's description of the car as defendant's car (R. 261-267) is adopted for convenient reference in this brief because defendant, although not the legal title holder, was the regular possessor of the car at the time of his arrest. (R. 260, 225-226, 209.) See *People v. Gale*, 46 Cal.2d 253, 257, 294 P.2d 13

During the search, the agent seized from the glove compartment a piece of brown sack paper, which was somewhat larger than but otherwise similar to the brown sack paper in which the bindles of heroin were wrapped. The District Court of Appeal ruled that the search and seizure were unconstitutional. (R. 263-67.)

At defendant's trial, the unconstitutionally seized sack paper was placed in the same prosecution exhibit (No. 4) as the two bindles of heroin and their sack paper wrapping and admitted in evidence over defendant's objection that a proper chain of possession had not been shown. The District Court of Appeal ruled that the paper was erroneously admitted in violation of *Mapp v. Ohio*, 367 U.S. 643 (1961) (R. 267), and that defendant's failure to raise the search and seizure point at the trial did not bar him from raising this point on appeal because there had been a change in the law between the time of trial and appeal. (R. 267-269.)

The principal additional question in the District Court of Appeal was whether the unconstitutional use of the unconstitutionally seized evidence could be dismissed as only harmless.

The California Attorney General conceded and argued in his brief before the District Court of Appeal that "In our case, the brown paper was also highly relevant since it was of the same type used to wrap the two bindles of heroin sold to the informer, and was also similar to the wrapping

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(1956); *People v. Martin*, 45 Cal.2d 755, 290 P.2d 855 (1955); *Preston v. United States*, 376 U.S. 364 (1964); *Jones v. United States*, 362 U.S. 257, 265 (1960); *Stoner v. California*, 376 U.S. 483, 490 (1964); *Chapman v. United States*, 362 U.S. 257, 265 (1960); *Mapp v. Ohio*, 367 U.S. 643, 659, n. 9 (1961).

on the object Cooper jammed into his mouth and swallowed." (R. 254.)

The District Court of Appeal, however, ruled that the violation of the United States Constitution could be dismissed as harmless because other evidence "establishes the sale by sufficient circumstantial evidence" and because "this chain of circumstances has its own factual integrity." (R. 270.)

Other relevant facts clearly establish that the use of the unconstitutionally seized evidence was prejudicial. They also show that defendant was denied his right of confrontation. Those facts are set forth in detail in the Court's opinion (R. 257-262, 272-273) and the record; they may be summarized as follows:

In early December 1961, federal agents began making transcriptions of an informer's calls to defendant's residence. (R. 192-193.) Federal agents, state agents, and local police thereafter set up a controlled narcotics transaction between an admittedly unreliable informer (R. 127, 59-60) and a man who "appeared" to be defendant.<sup>2</sup> (R. 257-260.)

The informer was arrested about dawn on December 21, 1961, for selling heroin. He was searched, taken to the Richmond, California police station, and interrogated for several hours. He agreed to act as an informer and was searched again at the police station, furnished with \$20.00 in marked money, and taken by state agent Armenta and

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<sup>2</sup> The police tactics used and similar tactics are described generally in Comment, *Administration of the Affirmative Trap and the Doctrine of Entrapment: Device and Defense*, 31 U.Chi.L.Rev. 137, 154-158 (1963).

Federal agent Lee to a downtown phone booth where he called defendant's residence. (R. 257-58.) The informer asked the woman who answered for "Joe," and when "Joe" answered, the informer said "How about a deuce." "Joe" said "yes" and the informer suggested they meet at a particular market. (R. 258.) Agent Armenta listened in on a twin phone; he later testified at the trial that he recognized defendant's voice and that "deuce" refers to bindles of heroin. (R. 258.)

Federal Agent Yates and police officer Stumpf had been observing, from about a block away, the house where defendant lived with his aunt, and shortly after the phone call, officer Stumpf "saw a person that fit the description" of defendant leave the house and drive off in a 1957 blue Oldsmobile in the direction of the market. (R. 258.)

Meanwhile, Agent Armenta and the informer had been dropped off by Agent Lee and were heading on opposite sides of the street for the market parking lot. (R. 258-259.) Two additional officers, Agent Groom and Lieutenant Sullivan, took up stations across the street. (R. 259.)

The officers' idea was to keep the informer and the suspect under continual observation by Armenta, Groom, and Sullivan from three different points. Agent Armenta said he saw defendant drive into the parking lot in a 1957 blue Oldsmobile but that he lost sight of the informer for about 2-3 minutes. (R. 259.) He did not testify to any meeting between the informer and the suspect. Agent Groom stated that from about 100 yards away (R. 167) he recognized the car as one defendant "usually drove" (R. 260) and saw the informer go up to the driver's side of the car and talk to a man in it who "appeared" to be defendant. (R. 259-260.)



Lieutenant Sullivan, who was about the same distance away from the parking lot as Agent Groom (R. 148), also said that the man in the car "appeared" to be defendant but that the informer sat inside the car on the front seat. (R. 260.) There were occasions when Agent Groom could not keep the informer in view (R. 122) and when Lieutenant Sullivan's view was partially obstructed by parked and passing cars. (R. 150.)

The informer returned to agent Lee's car, told agent Lee that he had the "stuff," and turned over two bindles of heroin wrapped in a brown paper packet. (R. 157, 260.)

A field test was made on the contents of the package, indicating that the substance was possibly an opium derivative. After the test was made the officers attempted to locate defendant's car. (R. 260.)

Defendant, while in the company of a woman and two children, was arrested by federal agent Yates about 3-4 hours later the same afternoon. (R. 88, 89, 113, 260.) Yates was accompanied by four other officers, including agent Groom. (R. 260.) In a scuffle following the arrest, defendant removed an object wrapped in brown paper from his shirt pocket and tried to put it in his mouth. Groom tried stubbornly but unsuccessfully to stop him and his finger was bitten by defendant in the process. (R. 261.) Defendant was then pressed to the hood of the car and taken to the police station. (R. 261.)

On the day following his arrest, defendant was interrogated by six officers. During the interrogation he said he was sorry about Groom's finger but thought he was being choked, and that he had been chewing a marijuana cigarette wrapped in brown paper. (R. 272-274.)

Defendant's car was seized and impounded and subjected to the above-described unconstitutional search and seizure one week after the arrest, not incident to the arrest, without a warrant, and in violation of *Preston v. United States*, 376 U.S. 364 (1964). (R. 261, 263-267.)

Defendant was thereafter indicted for selling heroin to the informer and for assaulting agent Groom.<sup>3</sup>

At the trial, the various agents and officers testified to their observations and about the informer's conduct. The trial court also admitted in evidence the testimony by federal agent Lee that when the informer returned to Lee's car, Lee asked him "if he had the stuff, at which time he said yes and he handed me a brown paper packet." (R. 157, 260.)

The informer was not produced as a witness. (R. 262.)

The marked money was never found and no other heroin was found despite thorough searches of defendant, his car, his female companion, his clothing, and his room. (R. 261.)

Defendant took the stand in his own behalf, denied negotiating a sale or selling heroin to the informer (R. 262), stated that he had fought with the informer about two weeks previously (R. 209-211), and that at the times in question

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<sup>3</sup> An amended indictment filed at the trial also charged defendant with a prior felony conviction for drunk driving and a prior conviction for selling marijuana. (R. 28-30, 237-239, 257.) The priors were admitted. (R. 257, 241-242.) The statute under which defendant was charged with sale of heroin provides that upon a defendant's conviction and his admission of one prior narcotics offense, "he shall be imprisoned in a state prison from 10 years to life, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than 10 years in prison." Calif. Health & Saf. Code §11501.

he was Christmas shopping and visiting with the woman and two children in whose company he was arrested. (R. 212-214.)

Defendant was convicted on both counts. His conviction was affirmed by the District Court of Appeal.<sup>4</sup>

Defendant petitioned the California Supreme Court for hearing and raised the additional question, based on the then newly decided case of *Pointer v. Texas*, 380 U.S. 400 (1965), that the prosecution's use of testimony based on assertions and conduct of the informer without producing him as a witness had denied to defendant his right of confrontation. (Cert. Rec. item 23, pages 3-4, 17-21.) The petition for hearing was denied. \*

Defendant then petitioned for the writ of certiorari that has brought the case here. (R. 277.)

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<sup>4</sup> In addition to the rulings summarized at the beginning of the Statement, the District Court of Appeal ruled: (1) The controlled narcotics buy did not violate *Escobedo v. Illinois*, 378 U.S. 478 (1964) and *Massiah v. United States*, 377 U.S. 201 (1964). (2) The evidence of assault was sufficient to dispute defendant's claim that he had a right to prevent forcible extraction of material from his mouth. (3) Various statements obtained during the police interrogation without prior warning were inadmissible but harmless or admissible because exculpatory. (4) Agent Armenta's use of a twin phone listening device on the informer's phone call did not violate the Federal Communications Act or state law. (5) There was probable cause to arrest defendant. (6) The trial court's observations in ruling on defendant's motion for acquittal did not deny defendant a fair trial. (7) An allegedly illegal search of defendant's room was consented to and in any event produced no evidence. (8) The prosecutor was not guilty of prejudicial misconduct. (9) Defendant was ably represented at trial. (R. 272-275.)

### Summary of Argument

The California District Court of Appeal correctly held that the piece of brown sack paper obtained in a warrantless search of defendant's car was unconstitutionally seized and unconstitutionally used as evidence at the trial.

The court below, however, was mistaken in dismissing the unconstitutional error as harmless. The unconstitutionally seized piece of sack paper was a vital link in the prosecution's case against defendant and at the very least, there is a reasonable possibility that it contributed to the conviction. Under *Fahy v. Connecticut*, 375 U.S. 85 (1963), therefore, the judgment must be reversed.

The judgment below must be reversed for the further reason that the unconstitutional use in a criminal trial of unconstitutionally seized evidence cannot be dismissed as only harmless error. The rule of reversal of the coerced confession and other cases involving violations of constitutional or important statutory rights is controlling. Unconstitutionally seized evidence is "tantamount to coerced testimony," *Mapp v. Ohio*, 367 U.S. 643, 656 (1961), and no rational basis exists for distinguishing unconstitutionally obtained real evidence from unconstitutionally obtained testimonial evidence. *Wong Sun v. United States*, 371 U.S. 471, 485-486 (1963). The notion that reversals will deter lawless police conduct or protect constitutional rights more in testimonial evidence cases than in real evidence cases is irresponsible. Reversal for unconstitutional error is a small cost for enforcement of the United States Constitution.

Finally, the judgment below must be reversed because the prosecution based its case on the assertions and con-



duct of an unreliable and untrustworthy informer without producing the informer at the trial and thereby denied defendant his crucial right of confrontation and cross-examination.

## ARGUMENT

### **I. The California District Court of Appeal Correctly Held That the Piece of Brown Sack Paper Was Unconstitutionally Seized in a Warrantless Search of Defendant's Car a Week After His Arrest and Unconstitutionally Used as Evidence Against Him at the Trial.**

The California District Court of Appeal held that Agent Groom's warrantless search of defendant's impounded car a week after the arrest and his seizure of a brown piece of sack paper from the glove compartment was a violation of defendant's "vital Fourth Amendment rights" and that under *Mapp v. Ohio*, 367 U.S. 643, 655-657 (1961), the paper was inadmissible. (R. 263-67.)

The court's holding is correct: The search was made without a warrant a week after defendant had been arrested and taken in custody. The car had been taken to the garage. There was no danger of concealed weapons, of destruction of evidence, or of removal of the vehicle from the locality. It follows that "the search was too remote in time or place to have been made as incidental to the arrest and . . . that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment, rendering the evidence obtained as a result of the search inadmissible." *Preston v. United States*, 376 U.S. 364, 368 (1964). The use of such evidence at the trial

was therefore unconstitutional. *Mapp v. Ohio*, 367 U.S. 643, 655-57 (1961).<sup>5</sup>

## II. The Unconstitutionally Seized Piece of Brown Sack Paper Was a Vital Link in the Prosecution's Case Against Defendant; at the Very Least, There Is a Reasonable Possibility That It Contributed to Defendant's Conviction. The Judgment Must Therefore Be Reversed.

In *Fahy v. Connecticut*, 375 U.S. 85 (1963) this Court found it unnecessary "to decide whether the erroneous admission of evidence obtained by an illegal search and

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<sup>5</sup> Two further arguments made by the respondent to the District Court of Appeal are now foreclosed by the decision of that court: First, the argument that defendant failed to object on search and seizure grounds is foreclosed because the court held that an objection would have been futile (R. 267-269) and decided the constitutional issue on the merits: See, e.g., *Baley v. Ohio*, 360 U.S. 423, 436 (1959) ("there can be no question as to the proper presentation of a federal claim when the highest state court passes on it"); cf. *Mapp v. Ohio*, 367 U.S. 643, 659, n. 9 (1961) (state procedural requirements governing assertion of constitutional challenges "must be respected"). Second, the argument, such as it is, that the constitutional rule of the *Preston* case can be undercut by a state vehicle forfeiture statute is foreclosed because the court removed any state law premises for this argument by holding that the statute in question neither purports to authorize nor authorizes warrantless searches of impounded cars. (R. 266.) The court's construction of its own state's statute is correct and controlling. See, e.g., *Guaranty Trust Co. v. Blodgett*, 287 U.S. 509, 513 (1933); *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 688 (1959).

The District Court of Appeal also effectively distinguished *Burge v. United States*, 333 F.2d 210, 218-19 (9th Cir. 1964), which upheld a search and seizure of evidence from an impounded car, as failing to even mention the *Preston* case and as not binding in any event. (R. 267.) The same distinction applies to the opinion of the Ninth Circuit on the rehearing of the *Burge* case. *Burge v. United States*, 342 F.2d 408, 414 (9th Cir.), cert. denied, 382 U.S. 829 (1965). The Fourth Amendment will be served and a conflict between the Ninth Circuit and California courts eliminated by a specific disapproval of the *Burge* case.

seizure can ever be subjected to the normal rules of 'harmless error' under the federal standard of what constitutes harmless error." 375 U.S. at 86. Fahy's conviction was reversed because the Court found that there was a "reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 86-87.

The standard of the *Fahy* case is amply met in this case: There is not only a reasonable possibility that the unconstitutionally seized piece of brown sack paper contributed to defendant's conviction; in fact, the paper was "highly relevant", as the state admitted to the District Court of Appeal, and was a vital link in the prosecution's case.

The prosecution placed the unconstitutionally seized piece of brown sack paper in the same exhibit as the very items that defendant was prosecuted for selling, namely the two bindles of heroin and their wrapping of a smaller piece of brown sack paper. (R. 267-68). The inference plainly intended was that the bindles wrapped in brown sack paper and the larger piece of brown sack paper both came from the defendant. The Attorney General candidly conceded, and indeed argued, in the District Court of Appeal that the unconstitutionally seized piece of brown sack paper was "highly relevant since it was of the same type used to wrap the two bindles of heroin sold to the informer, and was also similar to the wrapping on the object Cooper jammed into his mouth and swallowed." (R. 254.) The district attorney at the trial was also at pains to forge the brown paper link. In addition to placing the paper in the same exhibit as the bindles, he made a point of establishing that the object defendant placed in his mouth at the time of his arrest was wrapped in brown paper. (R. 90, 99-100.)

The trial judge presumably considered all portions of the exhibit and the other brown paper evidence. Because he, as the fact finder, might have found an insufficient linking of defendant to the sale of heroin without the illegal evidence in the case, the Court "cannot be sure that the scales were not tipped in favor of conviction by reliance upon the inadmissible" and highly relevant piece of brown sack paper. See *Wong Sun v. United States*, 371 U.S. 471, 492-93 (1963).

The unconstitutionally seized piece of brown sack paper was not only highly relevant in its own right, it was of crucial importance to a case that otherwise contained the following extensive weaknesses and conflicts:

1. The prosecution did not produce the informer as a witness at the trial. (R. 262.) The informer was the only person who could positively identify the suspect who supposedly sold him heroin.

2. The informer was admittedly unreliable (R. 127) and the police had no basis for believing him to be honest or trustworthy. (R. 59-60.) By virtue of his previous fight with defendant (R. 209-211) and his agreement with the police resulting in a reduced charge (R. 127-128) the informer easily could have been motivated to falsely accuse defendant.

3. The marked money given to the informer was not found despite thorough searches of defendant, his car, his room, and his female companion. (R. 261).\*

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\* In administering the "affirmative trap" in narcotics cases, even the police are likely to view a first sale as "faulty from an evidentiary point of view" if the marked funds are not found. See Comment, *Administration of the Affirmative Trap*, 31 U.Chi.L.Rev. 137, 156 at n. 83 (1963).



4. The three officers who were supposed to keep the informer and the suspect under observation could not and did not do so:

(a) Agent Armenta admitted that the informer was out of his view during the crucial 2-3 minutes of the purported meeting between the informer and the suspect. (See R. 259, 64, 72, 74-75.)

(b) Agent Groom's and Lieutenant Sullivan's stories conflicted: Agent Groom said that the informer walked up to and stood by the driver's side of the suspect's car. (R. 260.) Lieutenant Sullivan said that the informer approached the car and sat inside it on the passenger side. (R. 260.)

(c) Agent Groom and Lieutenant Sullivan were more than a football field length away from the market parking lot in which the sale of heroin supposedly took place and there were obstructions to their view. (R. 167, 121-22, 148, 150.)

5. The suspect in the car with the informer was never positively identified as the defendant by any one of the six officers involved in the case:

(a) Officer Stumpf said only that the suspect who got into the car that went to the parking lot "fit the description of" defendant, "had the same build" and limped. (R. 258, 184.)

(b) Agent Yates said that the suspect was a "large male subject" (R. 188) with "a fairly normal walk." (R. 190.) He did not see the suspect's face. (R. 189.) Al-

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Agent Yates' and Officer Stumpf's conflicting testimony whether the man limped or walked fairly normally illustrates one of the danger signals of eye-witness identification, namely a discrepancy in the descriptions of physical characteristics. See Wall, Eye-Witness Identification in Criminal Cases, 97-101 (1965).

though he arrested defendant later in the afternoon (R. 88), he did not testify that defendant was the same "large male subject" he had seen earlier.

(c) Agent Armenta said that he saw a car driven by defendant approach the market area (R. 259), but did not testify to any meeting between defendant and the informer and admitted that he lost sight of the informer for 2-3 minutes. (R. 259.)

(d) Agent Groom stated that the occupant of the car in the market parking lot only "appeared" to be defendant. (R. 260.)

(e) Lieutenant Sullivan stated that the occupant of the car in the market parking lot only "appeared" to be defendant. (R. 260.)<sup>\*</sup>

(f) Agent Lee did not attempt to identify defendant.

6. The foundations for the attempted identifications were unreliable:

(a) Officer Stumpf said that he had only seen defendant twice before on fleeting occasions. Both occasions were at night from a distance and on one occasion the man so identified was in a moving vehicle. (R. 183.)

(b) Agent Yates had never seen defendant before. (R. 190.)

(c) Agent Armenta had seen a driver in an unlighted car at night on a prior occasion and had been told by Agent Groom and another officer that the driver was defendant.

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<sup>\*</sup> The testimony of the above officers illustrates another danger signal to eye-witness identification, namely that "the witness fails to make a positive trial identification." See Wall, *supra*, n. 7 at 128-30.

(R. 60-61.) He did not testify to any independent knowledge or other prior observation of defendant.

(d) Agent Lee did not see defendant until his arrest. (R. 159.)

(e) Agent Groom and Lieutenant Sullivan did not testify about the basis of prior knowledge, if any, of defendant.

7. Despite thorough searches of defendant, his car, and his room, the only heroin ever linked to a person who "appeared" to be defendant was turned over by an admittedly unreliable informer.

8. Defendant testified in his own defense and disputed the testimony of the prosecution witnesses.

Every prosecuting official participating in this weak case considered the paper vital. The police thought it was important to hunt for more evidence than their own observations because they sent Agent Groom out to make a warrantless search of defendant's car a week after his arrest. The piece of brown sack paper that Agent Groom seized from the glove compartment was important enough to describe to the grand jury that indicted defendant. (R. 16.) It was important enough for the prosecution to place it in the same exhibit as the bindles of heroin and to refer to the brown paper linked to the defendant. It was important enough to be considered as evidence in the trial court. And, the paper was important enough for the Attorney General to argue on appeal that it was "highly relevant."

The practical judgment of the prosecuting officials that the paper was a vital link in the case and would contribute

to petitioner's conviction would seem to carry more weight than the speculations on a cold record of the appellate court. As the California Supreme Court stated in another search and seizure case, there is no reason to "treat this evidence as any less 'crucial' than the prosecutor . . . treated it." *People v. Cruz*, 61 Cal.2d 861, 868, 40 Cal.Rptr. 841, 395 P.2d 889 (1964).

At the very least, in this case there is a reasonable possibility that the unconstitutionally seized piece of brown sack paper contributed to defendant's conviction. Therefore, under *Fahy v. Connecticut*, *supra*, the judgment must be reversed.

A. THE CALIFORNIA DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT FAHY V. CONNECTICUT DID NOT REQUIRE REVERSAL OF DEFENDANT'S CONVICTION.

1. *The District Court of Appeal failed to apply the Fahy test.*

The District Court of Appeal ruled that the "chain of circumstances" apart from the illegal evidence "has its own factual integrity" and that "it does not appear to us to be reasonably probable that a result more favorable to defendant would have been reached in the absence of the above error." (R. 270.)

A "factual integrity" or "reasonable probability" test is plainly inconsistent with the *Fahy* case.\* Just as the

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\* Moreover, the reasonable probability test is inconsistent with the "material injury" test applied by the Connecticut Supreme Court and supported by the dissenting opinion in the *Fahy* case. A court could easily find that evidence "materially injured" a defendant without finding a reasonable probability that a different result would have been obtained if the evidence had been excluded. The



critical fact, under the *Fahy* case, is not the sufficiency of properly admitted evidence, so the critical fact in the instant case is not the "factual integrity" of the "chain of other circumstances" or whether a "reasonable probability" existed that a more favorable result would have been reached.

The District Court of Appeal's heavy reliance on four sufficiency of evidence cases<sup>10</sup> in support of its "factual integrity" holding further demonstrates that it did not follow the *Fahy* rule that "we are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is reasonable possibility that the evidence complained of might have contributed to the conviction." 375 U.S. at 86-87.

2. *To the extent the District Court of Appeal attempted to apply the Fahy test, it did so erroneously.*

The District Court of Appeal ruled as follows on the *Fahy* test:

"Nor, assuming without deciding that, as defendant would have it, we are called upon to inquire whether 'there is a reasonable possibility that the evidence com-

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reasonable probability test imposes an almost impossible burden on an appellant whereas Connecticut's "material injury test" was stated by the dissenting opinion in the *Fahy* case to be "as strict as any possible federal standard" 374 U.S. at 95, n. 3. Accordingly, whatever support there may be for the Connecticut rule does not support the much less strict California rule applied in the instant case.

<sup>10</sup> *People v. Basler*, 217 Cal.App.2d 389, 394-97, 31 Cal.Rptr. 884 (1963); *People v. Robison*, 193 Cal.App.2d 410, 411-412, 14 Cal.Rptr. 181 (1961); *People v. Givens*, 191 Cal.App.2d 834, 838, 13 Cal.Rptr. 157 (1961); *People v. Wilkins*, 178 Cal.App.2d 242, 245, 2 Cal.Rptr. 908 (1960).

plained of might have contributed to the conviction' (Fahy v. Connecticut (1963) 375 U.S. 85, 86-87), are we of the opinion that such reasonable possibility here exists. Indeed, in the light of the entire record, including the compelling characteristics of the sale and pre-sale search, we are at a loss to understand what actual probative value this piece of an ordinary paper bag could possibly have, there being no testimony establishing that it was a piece of the same paper in which the heroin was wrapped." (R. 270.)

The essential weaknesses in the court's statement are:

(a) *Probative value*

The probative value of the large piece of brown sack paper in Exhibit 4 is independent of the other evidence in the case: The logical inference is that the two pieces of brown sack paper in Exhibit 4 came from the same source. This inference is not made any weaker by the existence of other evidence; it exists independently. Why did the prosecution place the illegally seized piece of brown paper in Exhibit 4 if it did not want the trial court to infer that the paper came from the same source as the heroin? This question is not answered by the Court. As mentioned earlier, however, the Attorney General candidly conceded in his brief that the illegally seized evidence was "highly relevant." (R. 254.) It was the only evidence apart from the officers' testimony, that linked defendant to the sale of heroin.

(b) *Lack of testimony*

The lack of testimony establishing that the illegally seized piece of paper was a piece of the same paper in which the

heroin was wrapped demonstrates rather than detracts from the prejudicial nature of the evidence: The prosecution was able to have the damaging inference drawn from the exhibit without being required to support that inference with any testimony. Because it is entirely possible that testimony, scientific or otherwise, might have contradicted the inference, the prosecution's tactic of letting the illegally seized piece of paper rest in the same exhibit with the wrapped bindles of heroin was particularly damaging.

*(c) Unfair burden on defendants*

The court's ruling will impose a substantial and unfair burden on defendants in future cases: If unconstitutionally seized evidence is admitted, as here, without prosecution testimony such as that deemed important by the court, defendants will be forced not only to establish the illegality of the search and seizure, but to produce evidence of and witnesses to testify to the damaging effect of the illegal evidence. If the claim of illegality is not sustained, the proof will have fortified the prosecution's case.

Can a defendant in a criminal case who pleads not guilty and claims innocence fairly be asked to defend himself by showing guilt?

**B. THE APPROPRIATE REMEDY IS TO REVERSE THE JUDGMENT OF THE DISTRICT COURT OF APPEAL WITH DIRECTIONS TO REVERSE THE CONVICTION.**

The District Court of Appeal committed two fundamental errors: (1) It applied a local test of appellate review forbidden by the *Fahy* case. (2) It misapplied the *Fahy* test.

If the District Court of Appeal had simply applied its own local standard of appellate review and failed to apply

the *Fahy* test at all, respondent might urge that the District Court of Appeal should be allowed to apply the *Fahy* test on remand.

Such a remedy would unfairly prolong this case (defendant's trial and conviction took place more than 4 years ago) and would be futile because the District Court of Appeal has already attempted to apply and misapplied the *Fahy* test.

It is respectfully requested therefore, if the judgment of the District Court of Appeal is to be reversed on the grounds herein argued, that the reversal be accompanied with directions to reverse the conviction on the ground that, as a matter of law, a reasonable possibility exists that the unconstitutionally seized evidence contributed to defendant's conviction. See *Fahy v. Connecticut*, *supra*, 375 U.S. at 92 ("the conviction is reversed"); *Stoner v. California*, 376 U.S. 483, 490 and n. 8 (1964) ("the judgment must be reversed").<sup>11</sup>

### **III. The Unconstitutional Use in a Criminal Trial of Unconstitutionally Seized Evidence Cannot Be Dismissed as Only Harmless Error.**

#### **A. INTRODUCTION.**

In 1963, the California Supreme Court held that the evidentiary offer and use of the bloody fragments of a check that the police had brutally clubbed and choked out of the defendant in violation of the United States Constitution were nothing more than harmless blunders by the prosecu-

<sup>11</sup> A reversal by an appellate court in California is "deemed an order for a new trial, unless the appellate court shall otherwise direct." Calif. Pen. Code §1262.



tion and the trial court. *People v. Parham*, 60 Cal.2d 378, 33 Cal.Rptr. 497, 384 P.2d 1001 (1963), *cert. denied*, 377 U.S. 945 (1964).

Since the *Parham* case, there has been a parade of California cases sustaining convictions despite the use at trial of evidence unconstitutionally obtained in violation of the principles of *Mapp v. Ohio*, 367 U.S. 643 (1961) and *Escobedo v. Illinois*, 378 U.S. 478 (1964), as followed in *People v. Dorado*, 62 Cal.2d 338, 42 Cal.Rptr. 169, 398 P.2d 361, *cert. denied*, 381 U.S. 937, 946 (1965). The instant case is among them; others are described in Appendix A. In addition, many recent California cases, also described in Appendix A, sustain convictions despite unconstitutional comments on the defendant's failure to testify in violation of *Griffin v. California*, 380 U.S. 609 (1965). These cases depart sharply from the history, purpose, and long standing interpretations of California's harmless error rule. See Appendix B which sets forth the history of the harmless error rule in California. They go far beyond the idea that the states can develop "workable rules" to meet "the practical demands of effective criminal investigation and law enforcement." *Ker v. California*, 374 U.S. 23, 34 (1963). The California courts have even gone so far as to dismiss three separate violations in one case as harmless, *e.g.*, *People v. Helms*, 242 A.C.A. 528, 536-538 (1966), and to hold harmless the erroneous admission in evidence of unconstitutionally obtained confessions. *E.g.*, *People v. Jacobson*, 63 Cal.2d 319, 329-331, 46 Cal.Rptr. 515, 405 P.2d 555 (1965); *People v. Sheridan*, 236 Cal.App.2d 667, 670-671, 46 Cal.Rptr. 295 (1965). The infectious notion that violations of the United States Constitution can be dismissed as harmless is also spreading from *Parham* and its progeny to the federal courts, *e.g.*, *Burge v. United States*, 342 F.2d

408, 413 n. 2 (9th Cir.), *cert. denied*, 382 U.S. 829 (1965), and to the courts of other states. *E.g.*, *State v. Jones*, 410 P.2d 219, 221 (Ore. 1966); *Dean v. Fogliani*, 407 P.2d 580, 583 (Nev. 1965).

This trend of disregarding the United States Constitution must be stopped. It can be stopped by this Court's applying the accepted rule, applied in closely related cases, including the coerced confession cases, that unconstitutional error requires a reversal.

The "unconstitutional but only harmless" theory in illegally seized evidence cases is based on three premises: (1) The rule of reversal of the coerced confession cases is not controlling because such cases are in "a class by themselves" and because "almost invariably, . . . a confession will constitute persuasive evidence of guilt" whereas illegally obtained evidence may be "only a relatively insignificant part of the total evidence and have no effect on the outcome of the trial." (2) The basic purpose of the exclusionary rule is to deter unconstitutional law enforcement; that purpose would not be served by requiring reversals for the use at trial of unconstitutionally seized evidence deemed unimportant to a conviction. (3) "To require automatic reversal for such harmless error could not help but generate pressure to find that the unreasonable police conduct was lawful after all and thereby to undermine constitutional standards of police conduct to avoid needless retrial." *People v. Parham*, *supra*, 60 Cal.2d at 385-386.

The foregoing premises are fallacious and are answered in detail hereafter. In summary, the answers are:

(1) The coerced confession cases are not in a class by themselves. The rule of reversal of these cases and cases involving other constitutional or important statutory rights

is particularly applicable and controlling in illegal evidence cases. Illegally seized evidence is "tantamount to coerced testimony", *Mapp v. Ohio*, 367 U.S. 643, 656 (1961), and no rational basis exists for distinguishing unconstitutionally obtained real evidence from unconstitutionally obtained testimonial evidence. *Wong Sun v. United States*, 371 U.S. 471, 485-486 (1963). The notion that reversals will deter lawless police conduct or protect constitutional rights more in testimonial evidence cases than in real evidence cases is illogical and irresponsible.

(2) Rejection of the "unconstitutional but only harmless" theory is necessary to deter lawless law enforcement and the unconstitutional use of illegal evidence. Policemen and prosecutors are properly interested in securing convictions of guilty defendants. They will respond to the stimulus of a reversal even if they will not otherwise respect constitutionally protected rights.

(3) Fear of judicial irresponsibility is not a proper foundation for a rule of constitutional law that allows violations of the Constitution to go unremedied. Judges who would uphold illegal police conduct to sustain the conviction of a guilty man will as easily find the use of illegally seized evidence to be "harmless" to accomplish the same goal. In either case, such judges would encourage lawless police conduct.

#### B. THE RULE OF REVERSAL OF THE COERCED CONFESSION CASES AND CASES INVOLVING OTHER CONSTITUTIONAL OR IMPORTANT STATUTORY RIGHTS IS CONTROLLING IN ILLEGAL EVIDENCE CASES.

##### 1. *The rule of reversal in the coerced confession cases.*

If a coerced confession "is introduced at the trial, the judgment of conviction will be set aside, even though the

evidence apart from the confession might have been sufficient to sustain the jury's verdict." *Malinski v. New York*, 324 U.S. 401, 404 (1945); *Jackson v. Denno*, 378 U.S. 368, 376 (1964); *Lyons v. Oklahoma*, 322 U.S. 596, 597 n. 1 (1944); *Haynes v. Washington*, 373 U.S. 503, 518-519 (1963); *Stroble v. California*, 343 U.S. 181, 190 (1952); *Bram v. United States*, 168 U.S. 532, 540-542 (1897); *Brown v. Allen*, 344 U.S. 443, 475 (1953).

It was once held that if a jury rejected a confession as coerced, it could constitutionally base a conviction on other sufficient evidence, *Stein v. New York*, 346 U.S. 156, 188-194 (1952), but that holding has been overruled. *Jackson v. Denno*, 378 U.S. 368, 388-391 (1964). "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession. *Rogers v. Richmond*, 365 U.S. 534 . . . , and even though there is ample evidence aside from the confession to support the conviction." 378 U.S. at 376.

2. *The coerced confession cases are not in a class by themselves; the rule of reversal is applied in a wide variety of cases involving violations of constitutional and important statutory rights.*

The coerced confession cases are not in a class by themselves; the rule of reversal is applied in a wide variety of cases involving departures from "a constitutional norm or a specific command of Congress." See *Kotteakos v. United States*, 328 U.S. 750, 764-765 (1946). For example:

(a) When the accused is denied his constitutional right of counsel at a critical arraignment stage, the Court does



"not stop to determine whether prejudice resulted." *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *White v. Maryland*, 373 U.S. 59, 60 (1963).

(b) When the accused is denied his constitutional right to silence and to counsel in the police station, "no amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead." *Miranda v. Arizona*, 16 L.Ed.2d 694, 722 (1966). The Court "will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Id.*, 16 L.Ed.2d at 720.

(c) When an accused is denied his right to the undivided assistance of counsel of his own choice, the Court will not "indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser v. United States*, 315 U.S. 60, 76 (1942); cf. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

(d) When one ground of a conviction "is invalid under the Federal Constitution, the conviction cannot be upheld" even if other valid grounds are established. *Stromberg v. California*, 283 U.S. 359, 368 (1931) (First Amendment); *Williams v. North Carolina*, 317 U.S. 287, 292 (1942) (full faith and credit).<sup>12</sup>

(e) When an accused in a capital case is denied his Fifth Amendment right to a grand jury indictment, a reversal, indeed a dismissal of the information, is required because "the substantial safeguards to those charged with serious crimes cannot be eradicated under the guise of technical

<sup>12</sup> Note that the *Stromberg* and *Williams* cases were relied on in *Lyons v. Oklahoma*, *supra*, as authority for the rule in confession cases. 322 U.S. at 597, n. 1.

departures from the rules." *Smith v. United States*, 360 U.S. 1, 9 (1959).

(f) When an accused is denied his right to 12 jurors and given only 11, a reversal is required because it is not the Court's "province to measure the extent to which the Constitution has been contravened and ignore the violation, if, in our opinion, it is not, relatively, as bad as it might have been." *Patton v. United States*, 281 U.S. 276, 292 (1930).

(g) When an accused is denied his right to an impartial judge, the conviction must be reversed "no matter what the evidence was against him." *Tumey v. Ohio*, 273 U.S. 510, 535 (1927).

(h) When the jury has heard a televised interview such as that in *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963), the Court does "not hesitate to hold, without pausing to examine a particularized transcript of the voir dire examination of the members of the jury, that due process of law . . . required a trial before a jury drawn from a community of people who had not seen and heard" the "interview".

(i) When a judge mistakenly charges a jury in terms of an unconstitutional presumption, the error will not be dismissed as harmless, no matter how positive "the belief of appellate judges in the guilt of an accused." *Bollenbach v. United States*, 326 U.S. 607, 615 (1946).

(j) When an accused is denied a federal statutory right to an instruction regarding his failure to testify, the error cannot be excused as harmless because the harmless error rule was "intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict.

Of a very different order of importance is the right of an accused to insist on a privilege which Congress has given him." *Bruno v. United States*, 308 U.S. 287, 294 (1939).

(k) When the prosecution makes knowing use of perjured testimony, the accused's claim to protection "is not to be defeated merely because there may have been other evidence, untainted, sufficient to warrant a conviction; . . . the burden is not on the petitioner to show a probability that in the jury's deliberations the perjured evidence tipped the scales in favor of conviction. If the prosecutor is not content to rely on the untainted evidence, and chooses to 'button up' the case by the known use of perjured testimony, an ensuing conviction cannot stand, and there is no occasion to speculate upon what the jury would have done without the perjured testimony before it." *Coggins v. O'Brien*, 188 F.2d 130, 139 (1st Cir. 1951) (concurring opinion of Magruder, J.)<sup>13</sup>

Even in cases where important economic principles, and not personal liberties, are at stake, this Court has refused to add an additional test of prejudice to a showing that an important statute has been violated.<sup>14</sup>

<sup>13</sup> Cf. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) which reversed a conviction because of the knowing use of false testimony even though the testimony went "only to the credibility of the witness." The court held that "it is upon such subtle factors as the possible interest of the witness in testifying falsely that defendant's life or liberty may depend." *Id.* at 269. "[T]he false testimony used by the State in securing the conviction may have had an effect on the outcome of the trial." 360 U.S. at 272.

<sup>14</sup> For example:

(1) When an employer violated the statutory prohibition against interference with an employee plan of representation it made no difference that "a sweeping majority of the company's employees signified, by secret ballot, their satisfaction with the plan as revised in 1937 and their desire for its continuance," or that "prior to the

In addition to its application in a wide variety of cases, the rule of reversal for unconstitutional error also has the support of sound scholarly opinion. Gibbs, *Prejudicial Error: Admissions and Exclusions of Evidence in Federal Courts*, 3 Vill. L. Rev. 48 (1957).<sup>15</sup> See also Comment, *The Harmless Error Rule Reviewed*, 47 Colum. L. Rev. 450, 459-461 (1947). Even such a vigorous advocate of the harmless error doctrine as Wigmore recognized the crucial difference between the "ordinary rules of Evidence, which are mere instruments of investigation" and such constitu-

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adoption of the Wagner Act the plan did not run counter to any federal law, either in conception or administration." *NLRB v. Newport News Co.*, 308 U.S. 241, 248-249 (1939). "In applying the statutory test of independence it is immaterial that the plan had in fact not engendered, or indeed had obviated, serious labor disputes in the past, or that any company interference in the administration of the plan had been incidental rather than fundamental and with good motives. It was for Congress to determine whether, as a matter of policy, such a plan should be permitted to continue in force." *Id.* at 251.

(2) "Price-fixing combinations which lack Congressional sanction are illegal *per se*; they are not evaluated in terms of their purpose, aim or effect in the elimination of so-called competitive evils." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 228 (1940). The application of this important principle provides a useful contrast to the treatment as harmless of the ordinary minor errors that cropped up in the same case. *Id.* at 234-249.

The United States Constitution is entitled to at least as vigorous enforcement as the labor laws and the anti-trust laws.

<sup>15</sup> "The beneficial effect of a summary reversal once error has been determined in these fundamental rights cases is unmistakable. The practice simplifies and expedites the review of criminal cases, for evidence obtained at the expense of constitutional or other basic guarantees is almost invariably prejudicial. But of primary importance, one can think of few better methods of discouraging subsequent infringement of cherished rights; further, affirming despite such constitutional violations might well be interpreted as a sanctioning of reprehensible evidence-gathering methods." 3 Vill. L. Rev. at 68.



tional rights as the rights to a jury trial and the right to a fair trial which "are ends in themselves, because the one by constitution and the other by common sense of justice becomes a paramount object." 1. Wigmore, *Evidence* 369 (3rd Ed. 1940).<sup>18</sup>

3. *The rule of reversal is controlling in illegally seized evidence cases.*

The rule of reversal is particularly applicable and controlling in illegally seized evidence cases. The unconstitutional seizure and evidentiary use of goods, papers, effects, and documents is "tantamount to coerced testimony." *Mapp v. Ohio*, 367 U.S. 643, 656 (1961). Even before *Mapp v. Ohio*, *supra*, the admission of illegal evidence of arguably negligible value required a reversal. *Kremen v. United States*, 353 U.S. 346 (1957). Now that the exclusionary rule is recognized as a constitutional mandate, *Mapp v. Ohio*, *supra*, it would be anomalous to enforce it only when the illegal evidence is essential to conviction.

In applying the rule of reversal, as with the rule of exclusion, no rational basis exists for distinguishing unconstitutionally obtained real evidence from unconstitutionally obtained testimonial evidence. Compare *Wolf v. Colorado*, 338 U.S. 25 (1949) and *Stein v. New York*, 346 U.S. 156, 192 (1953) with *Mapp v. Ohio*, 367 U.S. 643, 655-657 (1961) and *Jackson v. Denno*, 378 U.S. 368, 383-386 (1964). See *Wong Sun v. United States*, 371 U.S. 471, 485-486 (1963); cf. *McDonald v. United States*, 335 U.S. 451, 456-467 (1948)

<sup>18</sup> Section 21 of 1 Wigmore, *Evidence* (3rd Ed. 1940) contains perhaps the most thorough discussion available of the history and purpose of the harmless error doctrine and an ample collection of cases from England, Canada and the United States.

(concurring opinion of Rutledge, J. applying coerced confession rule to illegal evidence). The notion, expressed by the California courts, that reversals will deter the unlawful extraction of testimonial evidence more than the unlawful seizure of real evidence is illogical and irresponsible. Fourth Amendment rights cannot be subjected to special conditions that are not imposed on any other "basic" constitutional right. For, if such conditions are imposed, "the right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as 'basic to a free society.'" *Mapp v. Ohio, supra*, 367 U.S. at 656.

There is, moreover, a compelling reason for applying the rule of reversal to illegally seized evidence cases: Under the mantle of "harmless error," *Mapp v. Ohio* will be eviscerated of meaning unless the state courts are prevented from dismissing unconstitutional errors thereunder as harmless, for it is perhaps an understatement to say that the Bill of Rights has not always been faithfully applied by state courts. See, Cahn ed., *The Great Rights, passim* (1963). The clear danger of upholding a conviction based upon a determination that a violation of an important right is harmless is that it becomes entrenched as a precedent, inviting future violation of the right.

The governing principle that must be enforced by this Court was stated in the foundation case of *Boyd v. United States*, 116 U.S. 616 (1886): The Constitution must be enforced, "though the proceeding in question is divested of the aggravating incidents of actual search and seizure." *Id.* at 635.

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Ibid.*

The rule of reversal that enforces the guiding principle of the *Boyd* case in coerced confession cases is required no less in illegally seized evidence cases. Reversal would be required even in the following extreme example:

Suppose, in a possession of heroin case, that the prosecutor, by valid evidence, links possession of forty pounds of heroin to the defendant. Suppose also, that he has available illegally seized evidence that the defendant had possessed one ounce of heroin. Probably, the one ounce would not be used if the prosecutor's case is strong without it. But suppose it is used in just such a strong case. Should admission of the ounce in evidence be overlooked as "only harmless"? The answer is clearly no.

Advocates of the unconstitutional but only harmless error rule would urge that constitutional rights should depend upon the strength of the evidence that police and prosecutors produce and that the violation of the United

States Constitution should be overlooked because the legal evidence of guilt is overwhelming. They miss the point.

Lawless law enforcement must be deterred. The very fact that legal evidence is sufficient only makes the seizure and use of illegal evidence "more unwarranted because so unnecessary," *Haynes v. Washington*, 373 U.S. 503, 519 (1963).

Furthermore, the "harmless error" rule greatly increases the probability that illegal searches will be made and that illegally seized evidence will be introduced at trials in future cases, like defendant's, where the prosecution's case is of questionable strength. In such cases, the police will be tempted to search unconstitutionally for and seize even a scrap of paper, as in the instant case, to shore up weak cases against defendants they believe to be guilty or to obtain other evidence knowing that the defendant may have difficulty tracing the poisoned fruit to a poisoned tree. Cf. *Wong Sun v. United States*, 371 U.S. 471, 487-488 (1963). Prosecutors will be tempted, as in the instant case, to use such evidence to "button up" their cases, cf. *Coggins v. O'Brien*, 188 F.2d 130, 139 (1st Cir. 1951) (concurring opinion of Magruder, J.), because the state has no appeal from an acquittal. And, for the same reason, trial courts are apt to follow the suggestion (of then Attorney General, now Governor, Brown) that they resolve reasonable differences of opinion about admissibility of such evidence in favor of the state, see Note, *Two Years with the Cahan Rule*, 9 Stan. L. Rev. 515, 538 (1957), keeping at the same time "an eye to the saving grace of the" harmless error rule. See *People v. Black*, 73 Cal.App. 13, 43, 238 Pac. 374, 387 (1925). While an occasional conviction upon a weak case will undoubtedly be reversed because the finding of



"harmless error" will be overturned, many close cases will uphold convictions and almost all strong cases against defendants will be allowed to stand. As a result there will be no effective remedy for unconstitutional searches and seizures in a large number of cases. Many of these weak and close cases will be ones where a remedy for a possibly innocent man is most needed.

That violations of constitutional rights are encouraged by the harmless error rule is demonstrated by the frequency with which the appellate courts in California have found it necessary to invoke that rule. See Appendix A; *United States v. Rubenstein*, 151 F.2d 915, 924 (2d Cir.) (dissenting opinion of Frank, J.) *cert. denied*, 326 U.S. 766 (1945). The time to stop this trend is now. It can be stopped only by a decision of this Court that requires reversal of convictions whenever unconstitutionally seized evidence is unconstitutionally used at trial. Precedent and reason compel such a result.

#### C. REVERSAL FOR UNCONSTITUTIONAL ERROR IS A SMALL COST FOR ENFORCEMENT OF THE CONSTITUTION.

The cost of reversal for unconstitutional error is a new trial. In return for this small cost, the defendant, the public, and the courts will receive the following substantial benefits:

- (1) An accurate test by trial whether the defendant can be convicted on valid evidence alone.

The underlying assumption of the proponents of the harmless error rule is that there is sufficient legal evidence to convict. If they are right, let that assumption be tested by a new trial on valid evidence alone before a judge or

jury who will see and hear the evidence, not by an appellate court that must speculate on a cold record whether prejudice resulted.

(2) A powerful deterrent to police and prosecutors who seek to button up their cases by violating the Constitution.

(3) An elimination of the enormous cost, delay, and burden in appellate courts of reviewing the facts of every case in detail for the purpose of speculating whether an unconstitutional error was "prejudicial."

(4) A substantial reduction of the increasing, almost unmanageable, demands on the United States Supreme Court and the federal habeas corpus courts to review the cases of state prisoners.

(5) An end to the inevitable discrimination that occurs when a state court treats constitutional rights substantially differently from the federal court across the street and when similar cases on their facts are disposed of differently, some by reversal and some by affirmance, simply because of an appellate judge's speculations about the shadings of prejudice resulting from unconstitutional errors.

(6) A clear statement of principles for prosecutors to follow in appraising their cases.<sup>17</sup>

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<sup>17</sup> "Unhesitatingly he should refuse to go forward with the presentation of evidence which has been obtained by illegal police invasion of a private home. If his case *depends* upon such evidence, he should dismiss the prosecution. If he can present a case without the use of evidence illegally procured, it should not be offered. But if notwithstanding, he insists upon introducing evidence illegally gained through improper invasion of the sanctity of a dwelling, we should tell him once again and for all, we will reverse a conviction, as we now do." *Williams v. United States*, 236 F.2d 487, 491 (D.C. Cir. 1959) (concurring opinion of Danaher, J.).

(7) A fair trial for accused persons. As Judge Frank stated in one of his several important dissenting opinions on the subject of harmless error, delay and expense "are of far less importance than a fair trial. And they will be incurred infrequently because of errors if, by reversals in cases like this, we educate prosecutors and trial judges to prevent unfairness to a person on trial." *United States v. Rubenstein*, 151 F.2d 915, 924 (2d Cir.) (dissenting opinion of Frank, J.); *cert. denied*, 326 U.S. 726 (1945). See also *United States v. Liss*, 137 F.2d 995, 100 (2d Cir.), *cert. denied*, 320 U.S. 773 (1943); *United States v. Mitchell*, 137 F.2d 1006, 1011 (2d Cir. 1943) (dissenting opinions of Frank, J.)

**D. FEAR OF JUDICIAL IRRESPONSIBILITY IS NOT A PROPER FOUNDATION FOR A RULE OF CONSTITUTIONAL LAW THAT ALLOWS VIOLATIONS OF THE CONSTITUTION TO GO UNREMEDIED.**

In *People v. Parham*, 60 Cal.2d 378, 386, 33 Cal.Rptr. 497, 384 P.2d 1001 (1963), *cert. denied*, 377 U.S. 945 (1964), the California Supreme Court applied its harmless error rule to unconstitutional evidence and reasoned that "to require automatic reversal for such harmless error could not help but generate pressure to find that the unreasonable police conduct was lawful after all and thereby to undermine constitutional standards of police conduct to avoid needless retrial."

The *Parham* reasoning is fallacious: Fear of judicial irresponsibility is not a proper foundation for a rule of constitutional law that allows violations of the Constitution to go unremedied. Only after thorough consideration did skepticism, not fear, about a jury's ability to isolate

exceedingly sensitive issues in confession cases, form part of the foundation for a rule of constitutional law, *Jackson v. Denno*, 378 U.S. 368, 388-391 (1964), and then only over strong dissent, 378 U.S. at 401-403, and only as a means to prevent violations of the Constitution, not to let them go unremedied. If there are judges who would uphold illegal police conduct to sustain the conviction of a guilty man, they will as easily find the use of illegally seized evidence to be "harmless" to accomplish the same goal. In either case, such judges would encourage lawless police conduct. These judges should not be encouraged by a rule that holds them harmless from their own consciences whenever they condone unconstitutional error.

**E. THERE IS NO ROOM FOR A DOUBLE STANDARD OF REVIEW IN ILLEGAL EVIDENCE CASES, ONE FOR STATE COURTS, THE OTHER FOR FEDERAL COURTS.**

In *Ker v. California*, 374 U.S. 23, 34 (1963), this Court held that the States are not "precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain."

An unconstitutional but only harmless error rule is not such a permissible local rule.

Workable rules in a limited framework for the police officer on the beat or in the patrol car who is concerned with an array of local crimes are one thing; a double stand-



ard for appellate judges in the quiet of their chambers is another. There is no criminal investigation or law enforcement need for permitting a state appellate court, any more than a federal appellate court, to dismiss unconstitutional error as harmless and no valid precedent for doing so. In *Lyons v. Oklahoma*, 322 U.S. 596, 597 n. 1 (1944), the federal rule of reversal in coerced confession cases was so plainly applicable to the states that no discussion was necessary and the matter was disposed of in a footnote. And in *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963), this Court assumed the applicability of a federal standard when it ruled that "on the facts of this case, it is not now necessary for us to decide whether the erroneous admission of evidence obtained by an illegal search and seizure can ever be subject to the normal rules of harmless error' under the federal standard of what constitutes harmless error. Compare *Ker v. California*, 374 U.S. 23, 24 . . . ."

A double standard also is incompatible with federal habeas corpus review of unconstitutional errors in state proceedings: California denies habeas corpus relief to petitioners claiming an unconstitutional search and seizure regardless of whether their cases became final before *Mapp v. Ohio*, 367 U.S. 643 (1961) or after. *In re Sterling*, 63 Cal.2d 486, 47 Cal.Rptr. 205, 407 P.2d 5 (1965). Federal habeas corpus relief is available to post-*Mapp* petitioners, however, see *Linkletter v. Walker*, 381 U.S. 618 (1965), who have not deliberately bypassed available state procedures. *Fay v. Noia*, 372 U.S. 391, 438-439 (1963). Accordingly, a petitioner who presents to the federal habeas corpus court a record showing that a California appellate court has ruled that unconstitutional error occurred at his trial but that the error was dismissed as harmless will

have demonstrated his use of all available state procedures. If the federal writ is governed by a federal rule of reversal, the writ should issue because the unconstitutional error will be apparent from the record, see *Townsend v. Sain*, 372 U.S. 293 (1963), and a double standard will have resulted only in imposing a futile burden of review on the state appellate courts and an added burden on the federal habeas corpus courts. If, however, the federal writ is held to be unavailable if the state court correctly applied its harmless error rule, an even greater burden will be placed upon the federal courts because it will still be a federal question whether the unconstitutional error in fact was properly ruled harmless. See *Napue v. Illinois*, 360 U.S. 264, 271-272 (1959). Such a question cannot be answered without a factual review by the federal court, and not just a review on a limited factual issue such as the voluntariness of a confession, but a review on the entire record. Not even the double standard of *Wolf v. Colorado*, 338 U.S. 25 (1949) imposed such an unmanageable burden on the federal courts, and the twelve years of experience under that case teaches that another twelve year experiment is not in order.

**F. THERE IS NO ROOM FOR A DOUBLE STANDARD OF REVIEW IN ILLEGAL EVIDENCE CASES, ONE FOR COURT TRIALS, THE OTHER FOR JURY TRIALS.**

The California District Court of Appeal rightly made no point of the fact in the instant case that defendant was tried by a court rather than a jury. In recent California cases, however, the notion has sprung up that when a judge commits an unconstitutional error in admitting unconstitutionally obtained evidence, his error can be dismissed as harmless more easily if he, rather than a jury,

is the sole judge of guilt. This kind of reasoning has led to the affirmance of convictions despite the unconstitutional admission even of an unconstitutionally obtained confession. See *People v. Williams*, 239 A.C.A. 35, 37-38 (1965).

If this new notion leads respondent to argue the judge-jury distinction to this Court, the distinction should be disapproved, not only in this particular case for the reason that the question was not presented by respondent in the court below, but for illegal evidence cases generally, including this one, for the reason that the distinction is unsound.

The *Fahy* case was court not jury tried and yet this court applied no different standard. *Fahy v. Connecticut*, 375 U.S. 85 (1963). See also *Rochin v. California*, 342 U.S. 165 (1951) (court trial). In a court trial, no less than in a jury trial, the appellate court "cannot be sure that the scales were not tipped in favor of conviction by reliance on the inadmissible" illegal evidence. *Wong Sun v. United States*, 371 U.S. 471, 493 (1963); see Note, *Improper Evidence in Non Jury Trials: Basis for Reversal?*, 79 Harv. L. Rev. 407 (1965). Accordingly, no distinction between court and jury trials of any constitutional dimension can or should be applied to the rule of reversal for unconstitutional error in admitting unconstitutionally seized evidence.

**IV. Defendant Was Unconstitutionally Denied His Right of Confrontation and Cross-Examination Because the Prosecution Based Its Case on Assertions and Conduct of an Unreliable and Untrustworthy Informer Without Producing the Informer as a Witness at the Trial.**

**A. DEFENDANT WAS UNCONSTITUTIONALLY DENIED HIS RIGHT OF CONFRONTATION.**

In *Pointer v. Texas*, 380 U.S. 400 (1965), the Court held (1) that the Sixth Amendment right to confront and cross-examine witnesses is applicable to the states by the Fourteenth Amendment and (2) that *Pointer* was denied this right when the Texas state court admitted in evidence, over objection, a transcript of the uncross-examined, preliminary hearing testimony of the defendant's victim, even though the witness had moved to California some time before the trial, did not intend to return to Texas, and was therefore beyond the subpoena power of the prosecution. The Court stated that "a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him." 380 U.S. at 407.

Defendant in the instant case was denied the opportunity to confront and cross-examine the key witness against him.


The trial court admitted in evidence, through the testimony of agent Lee, the crucial and uncross-examined statement of the participating informer, that "yes," he had the "stuff", and admitted federal agent Lee's testimony that the informer turned the stuff in a brown paper packet over to him. (R. 260; 157.) The trial court also admitted the testimony of the officers concerning every pertinent



movement of the informer from his arrest to his delivery of heroin to agent Lee. The informer's statement and the officers' testimony concerning his conduct were an essential part of the prosecution's case and the trial court was particularly influenced by the testimony as to the informer's conduct in turning over the bindles to agent Lee. (R. 208.)

The informer was not produced as a witness by the prosecution for confrontation and cross-examination. He was, however, a witness against defendant in every sense except for his absence at the trial: The implicit foundation of the prosecution's case, assuming that the prosecution acted forthrightly and honestly, was that the informer told them that defendant was in the car at the market parking lot: (1) If the informer had told the officers that someone else was in the car, the prosecution could not have been honestly maintained; this possibility must be rejected. (2) It is unrealistic and would attribute incompetence to the officers to assume that they did not question the informer as to the identity of the person in the car; this possibility must also be rejected. (3) It is also unrealistic to assume that the informer was not able to determine the identity of the person in the car; he knew defendant previously and was therefore able to determine whether the man in the car was defendant. (4) The only reasonable possibility remaining is that the informer told the officers that the person in the car was defendant. This assertion was particularly important because the officers' identification was equivocal; the officers did not positively identify the other man in the car at the lot as defendant but only that he "appeared" to be defendant.

Production of the informer as a witness for confrontation and cross-examination would have enabled defendant:



1. To test the informer's extra judicial assertions, express and implied, that the man he perceived in the car was defendant.

2. To test whether he was motivated to falsely imply by his assertions and by his conduct that the man in the car was defendant. Cf. Finman, *Implied Assertions as Hearsay*, 14 Stan. L. Rev. 682 (1962); Witkin, *California Evidence*, 239-40 (1958) (§214) ("the prevailing rule is . . . [that] if the conduct is offered in proof of some fact, in order to draw inferences as to the person's belief in the truth of that fact, the conduct is an *implied assertion* of the fact and just as objectionable as an express assertion"). The danger that the informer was motivated to falsely accuse defendant was substantial because of his unreliability and untrustworthiness (R. 127, 59-60), his obvious interest in cooperating with the police to secure the reduction in his own charge (R. 127-128) and his prior fight with defendant. (R. 209-211.)

3. To determine whether a defense of entrapment existed and, if so, to lay the basis for that defense without admitting guilt. See *People v. Perez*, 62 Cal.2d 769, 775-776, 44 Cal.Rptr. 326, 401 P.2d 934 (1965). See also *Sherman v. United States*, 356 U.S. 360 (1958).

4. To explore the possibility that "police pressure brought to bear to persuade [him] to turn informer" after several hours of interrogation was outside any "limits within which the police may use an informer to appeal to friendship and camaraderie-in-crime to induce admissions from a suspect." *Lopez v. United States*, 373 U.S. 427, 444 (1963) (concurring opinion of Chief Justice Warren).

5. To obtain and examine any relevant prior statements the prosecution had obtained from the informer because he would then have been a prosecution witness. See *People v. Chapman*, 52 Cal.2d 95, 98, 338 P.2d 428 (1959) (statements of prosecution witnesses relating to the subject matter of their testimony).

Many of the reasons relied on in *Roviaro v. United States*, 353 U.S. 53 (1957) for requiring the prosecution to disclose the identity of the police informer support a requirement that the prosecution produce the informer as a witness at the trial when he has been used as the prominent actor in the controlled narcotics buy. In the *Roviaro* case, informer "John Doe's possible testimony was highly relevant and might have been helpful to the defense. So far as petitioner knew, he and John Doe were alone and unobserved during the crucial occurrence for which he was indicted. Unless petitioner waived his constitutional right not to take the stand in his own defense, John Doe was his one material witness. Petitioner's opportunity to cross-examine Police Officer Bryson and Federal Narcotics Agent Durham was hardly a substitute for the opportunity to examine the man who had been nearest to him and took part in the transaction. Doe had helped to set up the criminal occurrence and had played a prominent part in it. His testimony might have disclosed an entrapment. He might have thrown doubt upon petitioner's identity or on the identity of the package." 353 U.S. at 63-64.

Defendant was not obliged to undertake the burden and disadvantage of disclosing the materiality of the expected testimony and obtaining a court order, as required under California law, to release the informer from the county jail to testify, see 28 Ops. Cal. Atty. Gen. 59 (1956); Calif.

Code Civ. Proc. §1995; cf. *People v. Wilkins*, 178 Cal. App.2d 242, 245, 2 Cal.Rptr. 908 (1960) (subpena); or to suffer the additional disadvantage of having an unreliable and untrustworthy informer cast in the light of a witness for the defense. "It is no answer to say that the defense can call an informer . . . as a hostile witness . . . . He may be so undependable and disreputable that no defense counsel would risk putting him on the stand. Moreover, as a defense witness, he would be open to impeachment by the Government, his late employer. The tactical possibilities of this situation would be apparent to a prosecutor bent on obtaining a conviction . . . . And if not required to call the informer, he may place on the defense the onus of finding and calling a disreputable witness who, if called, may be impeached on all collateral issues favoring the defense. The effect on law enforcement practices need hardly be stated: the more disreputable the informer employed by the Government, the less likely the accused will be able to establish any questionable law enforcement methods used to convict him." *Lopez v. United States*, 373 U.S. 427, 445 (1963) (concurring opinion of Chief Justice Warren).

In a criminal trial, the prosecution must "shoulder the entire load". *Tehan v. Shott*, 382 U.S. 406 (1966). The informer was apparently in custody in the county jail (R. 127-128, 206) and should have been produced by the prosecution.

If the prosecution cannot rely on out-of-court assertions when the witness is unavailable, *Pointer v. Texas*, *supra*, it surely cannot be allowed to rely on the assertions and conduct of an available key witness when it has made a deliberate decision not to produce him at the trial. "The Government which prosecutes an accused has the duty . . .



to see that justice is done. *Jencks v. United States*, 353 U.S. 657, 671 . . . (1957). The missing . . . [informer] was . . . a key figure in this prosecution, and it was the government's duty to expend every reasonable effort to produce him at trial. His absence, without satisfactory explanation, makes necessary the grant of a new trial." *United States v. Clarke*, 220 F.Supp. 905, 909 (E.D. Pa. 1963); see *Lopez v. United States*, 373 U.S. 427, 444-445 (1963) (concurring opinion of Warren, C.J.); *United States v. Ramsey*, 220 F.Supp. 86 (E.D. Tenn. 1963); Note, *Prosecution Required to Produce Alleged Entrapper as Witness at Trial*, 64 Colum. L. Rev. 359 (1964).

#### B. THE CONFRONTATION QUESTION IS PROPERLY BEFORE THE COURT.

At the close of the prosecution's case, defendant moved to dismiss. In support of the motion, his attorney stated in part that: "The circumstances, I believe, are quite strange and unusual. The informant, who is in custody in this county, has not been called to testify. \* \* \* I feel that this is the type of investigation, the type of error—not calling [him]—that seems to me there is something very wrong there; that there's so much reasonable doubt that I don't believe this case should be allowed to proceed further." (R. 206, 207.)

The trial court denied the motion, relying heavily on the testimony about the informer, *e.g.*, "I have no doubt that the contact was made. The two bindles are here. Agent Lee says they were turned over to him by [the informer] after the contact." (R. 208.)

Defense counsel's motion was based on an apt assumption of what the law should be. At the time, however, and

on March 23, 1965, when the hearing on this case was held in the District Court of Appeal and all the briefs had been filed; the California right of confrontation was only statutory, Calif. Pen. Code §686(3), and was not recognized as a constitutional right in the California courts. *E.g.*, *People v. Purcell*, 22 Cal.App.2d 126, 131, 70 P.2d 706 (1937). Cases in the United States Supreme Court, particularly *West v. Louisiana*, 194 U.S. 258, 262 (1904), had "stated that the Sixth Amendment's right of confrontation does not apply to trials in state courts, on the ground that the entire Sixth Amendment does not so apply." *Pointer v. Texas*, 380 U.S. 400, 406 (1965). On the specific question presented here, the California District Court of Appeal, First Appellate District, had ruled in another case that the prosecution had no obligation to produce the informer it had used in a narcotics case as a witness at the trial. *People v. Render*, 181 Cal.App.2d 190, 195, 5 Cal.Rptr. 236 (1960). See also *People v. Brooks*, 234 Cal.App.2d 662, 678, 44 Cal.Rptr. 661 (1965).

On April 5, 1965, however, the United States Supreme Court decided *Pointer v. Texas*, 380 U.S. 400 (1965). The *Pointer* case held that "the statements made in *West* and similar cases generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law. We hold that petitioner was entitled to be tried in accordance with the protection of the confrontation guarantee of the Sixth Amendment, and that that guarantee, like the right against compelled self-incrimination, is 'to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against encroachment.'" 380 U.S. at 406, quoting from *Malloy v. Hogan*, 378 U.S. 1, 10 (1964).

The decision of the District Court of Appeal was filed May 24, 1965. (R. 257.) There were only 15 days thereafter within which to petition for a rehearing. Calif. Rule of Court No. 27(b). A losing appellant is not required to file a futile petition for rehearing in the court that ruled against him and, with additional time, may petition directly for a hearing in the California Supreme Court. See Calif. Rule of Court Nos. 28-29.<sup>18</sup> Under California procedure, when a petition for hearing is granted, the opinion of the District Court of Appeal is superseded and the California Supreme Court takes over the entire case and is empowered to decide and has not hesitated to decide a case on new grounds. See, e.g., *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905 (1955), superseding decision of the District Court of Appeal reported in 274 P.2d 724 (1954). A petition for rehearing in the instant case also would have been particularly futile because the same judges that decided the case rule adversely on the confrontation issue in another case only two days later. *People v. Brooks*, 234 Cal.App.2d 662, 678, 44 Cal.Rptr. 66 (1965). Defendant's counsel did not see the *Pointer* case until June 15, 1965 when he was preparing defendant's petition for hearing to the California Supreme Court. See Cert. Rec. item 23, p. 3, n. 3. Finally, it was not until November 1965 that the California Supreme Court made clear that the scope of the new federal right of confrontation was an open question. See *People v. Aranda*, 63 Cal.2d 518, 530, n. 8, 47 Cal.Rptr. 353, 407 P.2d 265 (1965).

<sup>18</sup> If the defendant wants to challenge incorrect statements or omissions of "material facts" in the District Court of Appeal or its failure to consider "substantial legal issues raised in the briefs," he should petition the District Court of Appeal for a rehearing as to those challenges. Calif. Rule of Court No. 29(b). Neither of such grounds was present here.

The first meaningful occasion that the new federal question of confrontation could have been presented to the California courts was in the petition for hearing to the California Supreme Court. It was squarely so presented. (Cert. Rec. item 23, pages 3-4, 17-21.) Respondent filed no answer to the petition on procedural or other grounds. Given California's tradition that defendants in criminal cases should have full opportunity to raise their claims, *e.g.*, *People v. Kitchens*, 46 Cal.2d 260, 262-263, 294 P.2d 17 (1956), respondent would most certainly have lost an argument that defendant's claim was not properly before the court. Furthermore, respondent in its brief in opposition to the petition for a writ of certiorari discussed the confrontation question on the merits and raised no claim that the question was not properly presented.

In summary, the new federal question of confrontation was raised at the earliest and only meaningful opportunity in the state court proceedings that it could have been raised. The confrontation question is therefore properly before this Court. *E.g.*, *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 320 (1930) (federal question first raised in petition for rehearing in state court because of a change in the law); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 677-78 (1930) (raising federal question in the petition for rehearing was timely "since it was raised at the first opportunity"); see *Great Northern Rwy. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 366-367 (1932); *Cicenia v. La Gay*, 357 U.S. 504, 507, n. 2 (1958).



**Conclusion**

For the reasons stated it is respectfully submitted that the judgment of the District Court of Appeal should be reversed with directions to reverse the judgment of the trial court.\*

Respectfully submitted,

**MICHAEL TRAYNOR**  
*Counsel for Petitioner*  
*By appointment pro hac vice*

October 13, 1966.

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\* In *Douglas v. California*, the writ of certiorari had also been granted to the California Supreme Court, 368 U.S. 815 (1961) but the District Court of Appeal, whose judgment was in issue, was ordered to grant the relief there necessary. 372 U.S. 353, 358 (1963).

**Certificate of Service by Mail by Attorney**

MICHAEL TRAYNOR certifies that he is an active member of the State Bar of California and the appointed counsel for petitioner in this case; that his business address is 333 Montgomery Street, San Francisco, California; that he served a copy of the foregoing Brief for the Petitioner on the State of California pursuant to Rule 33 by placing the copy in an envelope and then sealing the envelope and depositing it in a United States post office or mail box on October 13, 1966, at San Francisco, California, with first class postage prepaid, addressed to counsel of record at his post office address as follows:

HONORABLE THOMAS C. LYNCH  
Attorney General of California  
6000 State Building  
San Francisco, California 94102.  
Attention: Assistant Attorney General  
Albert Harris.

MICHAEL TRAYNOR

## APPENDIX A

### **California Cases From *People v. Parham*, 60 Cal.2d 378 (1963) to the Present That Dismiss Violations of the United States Constitution as Nothing More Than Harmless Error**

In general, the cases included in the following summary are only those cases in which a California appellate court has affirmed a conviction after expressly holding that a violation of the United States Constitution occurred but that the violation could be dismissed as harmless. In general, the following types of cases have been excluded: (1) Cases in which the appellate court finds no violation but assumes that if one occurred it was harmless. *E.g.*, *People v. Jefferson*, 230 Cal.App.2d 151, 157, 40 Cal.Rptr. 715, 719 (1964). (2) Cases that uphold police conduct even though a federal court might hold otherwise. *E.g.*, *People v. Corrao*, 201 Cal.App.2d 848, 20 Cal.Rptr. 492 (1962) (landlady's consent to search.) Compare *Chapman v. United States*, 365 U.S. 610 (1961) (defendant not bound by landlord's consent.) See generally Manwaring, *California and the Fourth Amendment*, 16 Stan. L. Rev. 318 (1964). (3) Cases that dismiss violations of federal constitutional rights sub silentio without a reported opinion. Calif. Rule of Court No. 976 (court rule in effect since January 1, 1964 that permits or requires non-publication in certain cases.)

It bears noting also that most of the summarized cases involve violations of and conduct deemed by the appellate courts to have been proscribed by *Escobedo v. Illinois*, 378 U.S. 478 (1964) as followed in *People v. Dorado*, 62 Cal.2d 338, 42 Cal.Rptr. 169, 398 P.2d 361, cert. denied, 381 U.S. 937, 946 (1965); cf. *Johnson v. New Jersey*, — U.S. — (1966). These cases will be California's blueprint for evasion of *Miranda v. Arizona*, — U.S. — (1966) if the notion is upheld that a violation of the United States Constitution can be dismissed as nothing more than harmless error.

# ADMISSION OF UNCONSTITUTIONALLY SEIZED EVIDENCE IN VIOLATION OF MAPP V. OHIO, 367 U.S. 643 (1961)

Citation	Crime Charged	Description of unconstitutionally seized evidence
People v. Parham, 60 Cal.2d 378, 33 Cal. Rptr. 497, 384 P.2d 1001 (1963), <i>cert. denied</i> , 377 U.S. 945 (1964)	robbery	check brutally choked and clubbed out of the defendant.
People v. Cooper, 234 Cal.App.2d 587, 44 Cal. Rptr. 483, 492 (1965) (the instant case)	sale of heroin	brown sack paper resembling brown sack paper in which bundles were wrapped.
People v. Bustillos, 237 Cal.App.2d 554, 47 Cal.Rptr. 283, 285-286 (1965)	possessing heroin for sale	a large quantity of narcotics and narcotic paraphernalia.
People v. Thomsen, 239 A.C.A. 78, 85-86, 48 Cal.Rptr. 455 (1965)	robbery and conspiracy	personal notations seized from sewn-up pocket that bore name of robbed jewelry store.
People v. Evans, 340 A.C.A. 301, 49 Cal. Rptr. 501 (1966)	grand theft, violation of weapons law, two counts of burglary	stolen property illegally seized from defendant's apartment was prejudicial as to one count of burglary but not on other charges.
In re Shipp, 62 Cal.2d 543, 43 Cal. Rptr. 3, 5-6, 399 P.2d 571 (1965)	murder	articles belonging to murder victim; habeas corpus judg- ment denying relief from con- viction of murder affirmed on alternative grounds of harm- less error and unavailability of collateral attack.
People v. Helms, 242 A.C.A. 528, 531-532, 536-537 (1966)	robbery, burglary, and assault	stolen electronic unit.



**ADMISSION OF UNCONSTITUTIONALLY OBTAINED STATEMENTS  
IN VIOLATION OF ESCOBEDO V. ILLINOIS, 378 U.S. 478 (1964)**

<u>Citation</u>	<u>Crime charged</u>	<u>Description of unconstitutionally obtained statements</u>
People v. Hall, 62 Cal.2d 104, 41 Cal. Rptr. 284, 288, 396 P.2d 700 (1964)	murder	statement that defendant had washed shoes shown to be bloody; conviction reversed on other grounds, not violation of Constitution.
People v. Finn, 232 Cal.App.2d 422, 42 Cal.Rptr. 704, 707-08 (1965)	possession of marijuana	admission that defendant had resided in house and used bathroom where marijuana was found.
People v. Soto, 233 Cal.App.2d 437, 42 Cal.Rptr. 799, 803-04 (1965)	robbery	exculpatory statement that the substance on defendant's shirt was hot sauce, not blood and that he had found stolen watch.
People v. Saldana, 233 Cal.App.2d 24, 43 Cal.Rptr. 312, 317-18 (1965), <i>cert. denied</i> , — U.S. —	rape	that defendant had worn identified clothes on the night victim was raped and explanations of his recent facial scratches.
People v. Reid, 233 Cal.App.2d 163, 43 Cal.Rptr. 379, 387-388 (1965), <i>cert. denied</i> , 382 U.S. 995	attempted grand theft of steer parts	admission that defendant had gone to the Gorman area armed with a rifle and had taken parts of a steer allegedly shot by codefendant.
People v. Jack, 233 Cal.App.2d 446, 43 Cal.Rptr. 566, 575-76 (1965)	forgery of prescription to dangerous drug	statements showing consciousness of guilt and admissions of prior similar offenses.
People v. Nelson, 233 Cal.App.2d 440, 43 Cal.Rptr. 626, 628-629 (1965), <i>cert. denied</i> , — U.S. —	rape	exculpatory statements, description of location where pants might be found, and admission of lying to police.
People v. Beverly, 233 Cal.App.2d 702, 43 Cal.Rptr. 743, 752-53 (1965)	murder	admission that defendant had stabbed the victim coupled with claim of self-defense.

Citation	Crime charged	Description of unconstitutionally obtained statements
People v. Hillery, 62 Cal.2d 692, 44 Cal. Rptr. 30, 41-43 (1965)	murder	conflicting exculpatory statements.
People v. Estrada, 234 Cal.App.2d 136, 44 Cal.Rptr. 165, 180-81 (1965)	narcotics possession	statements attempting to explain needle marks as burns.
People v. Woods, 234 Cal.App.2d 186, 44 Cal.Rptr. 187 (1965)	robbery	admission that defendant had driven to victim's home.
People v. Fisher, 234 Cal.App.2d 189, 44 Cal.Rptr. 302, 305-06 (1965)	robbery	false alibi.
People v. Haley, 234 Cal.App.2d 444, 44 Cal.Rptr. 346, 352-54 (1965)	murder	admissions that the gun was in defendant's hand and went off; contradictory versions of the shooting.
People v. Cooper, 234 Cal.App.2d 587, 44 Cal.Rptr. 483, 494-95 (1965) (the instant case)	sale of heroin	admission to chewing a marijuana cigarette wrapped in brown paper.
People v. King, 234 Cal.App.2d 423, 44 Cal.Rptr. 500, 507 (1965), cert. denied	possession of marijuana	admissions to prior use of marijuana, of knowledge of visitor's narcotic activities, and that defendant had "a pretty good idea" of the nature of contraband seized by the police.
People v. Ford, 234 Cal.App.2d 480, 44 Cal.Rptr. 556, 564-65 (1965)	unlawful taking and driving of auto	second confession.
People v. Brooks, 234 Cal.App.2d 662, 44 Cal.Rptr. 661, 677-78 (1965)	possession of marijuana and heroin	reversal of three convictions on associated counts of possession of heroin and marijuana and sale of marijuana because of erroneous admission of confession and incriminating statements did not require reversal on these two other counts.

Citation	Crime charged	Description of unconstitutionally obtained statements
People v. Ross, 234 Cal.App.2d 758, 44 Cal.Rptr. 722, 725-27 (1965), <i>cert denied</i> , — U.S. —	rape	alibi.
People v. Starkey, 234 Cal.App.2d 822, 44 Cal.Rptr. 738, 743 (1965)	auto theft and burglary	alibi statement used to im- peach.
People v. Robinson, 62 Cal.2d 889, 44 Cal.Rptr. 762, 766-67 402 P.2d 834 (1965)	forgery	exculpatory statement that apparent instrumentalities of the crime of forgery had been purchased from "Blackie."
People v. Daboul, 234 Cal.App.2d 800, 44 Cal.Rptr. 744, 746 (1965)	burglary	conflicting exculpatory state- ments.
People v. Bazaure, 235 Cal.App.2d 21, 44 Cal.Rptr. 831, 838 (1965), <i>cert. denied</i> , — U.S. —	murder	exculpatory and inconsistent statements.
People v. Wozniak, 235 Cal.App.2d 243, 45 Cal.Rptr. 222, 229-231 (1965)	burglary	admissions to knowledge of whereabouts of stolen prop- erty.
People v. Nye, 63 Cal.2d 166, 45 Cal.Rptr. 328, 333-336, 403 P.2d 736 (1965), <i>cert. denied</i> , — U.S. —	murder	admissions of theft from vic- tim's house, alibi, and incon- sistent stories.
People v. Williams, 235 Cal.App.2d 389, 45 Cal.Rptr. 427, 433-435 (1965)	robbery	admissions to taking victim's property; denials of force or fear.
People v. Mills, 235 Cal.App.2d 662, 45 Cal.Rptr. 508, 511 (1965)	possession of heroin	admissions of use of heroin and unsatisfactory explana- tions of possession.

<u>Citation</u>	<u>Crime charged</u>	<u>Description of unconstitutionally obtained statements</u>
People v. Bishop, 235 Cal.App.2d 658, 660-661, 45 Cal.Rptr. 533, 535-536 (1965)	sale of marijuana	admissions of prior and cur- rent use of marijuana.
People v. Propp, 235 Cal.App.2d 619, 45 Cal.Rptr. 690, 702-05 (1965)	robbery, conspiracy; possession of prohibited weapons	incriminating admissions not amounting to a confession.
People v. Du Bont, 235 Cal.App.2d 844, 45 Cal.Rptr. 717, 720 (1965)	receiving stolen property	contradictory and evasive statements to police.
People v. Green, 236 Cal.App.2d 1, 45 Cal.Rptr. 744, 748 (1965)	murder	purported confession followed by denials.
People v. Dozier, 236 Cal.App.2d 944, 45 Cal.Rptr. 770, 773-774 (1965)	robbery and assault	admissions that defendant had contacted victim and ex- culpatory statements.
People v. Polite, 236 Cal.App.2d 85, 45 Cal.Rptr. 845, 849-850 (1965)	robbery and kidnapping	concession that if victim said "I was there, I must have been there."
People v. Anderson, 236 Cal.App.2d 419, 46 Cal.Rptr. 1, 5-9 (1965)	robbery	"I tried, I tried to get some money. The gun I had got Friday night" and similar statements constituting ad- missions on robbery charge and confession on firearm charge.
People v. De Leon, 236 Cal.App.2d 530, 46 Cal.Rptr. 241, 246 (1965)	burglary	admissions.



Citation	Crime charged	Description of unconstitutionally obtained statements
People v. Sheridan, 236 Cal.App.2d 667, 670-671 46 Cal.Rptr. 295, 297-298 (1965)	possession of heroin	second confession.
People v. Gurule, 236 Cal.App.2d 847, 46 Cal.Rptr. 459, 463 (1965)	burglary	defendant Gurule's admissions to presence at scene of crime and preliminary discussions and defendant Gonzales' confession as to Gurule.
People v. Jacobson, 63 Cal.2d 319, 46 Cal.Rptr. 515, 405 P.2d 555 (1965), <i>cert. denied</i> , — U.S. —	murder	two of ten confessions.
People v. Cotter, 63 Cal.2d 386, 46 Cal.Rptr. 622, 405 P.2d 862 (1965)	murder	last three of seven confessions.
People v. Cully, 236 Cal.App.2d 769, 46 Cal.Rptr. 644, 650 (1965)	attempted burglary	second confession.
People v. Barry, 237 Cal.App.2d 154, 46 Cal.Rptr. 727 (1965)	grand theft	exculpatory statements used to impeach.
People v. Mathis, 63 Cal.2d 416, 46 Cal.Rptr. 785, 796, 406 P.2d 65 (1966)	murder	exculpatory statement used to show construction of elaborate falsehood.
People v. Garrow, 237 Cal.App.2d 439, 47 Cal.Rptr. 24, 27-28 (1965)	lewd conduct with child	admission that defendant might have been on premises where attack occurred.
People v. Luher, 63 Cal.2d 464, 47 Cal.Rptr. 209, 214-16, 407 P.2d 9 (1965)	robbery, conspiracy, and murder	first defendant's statements that he "could think of a lot better place to hide the gun" and other admissions.

<u>Citation</u>	<u>Crime charged</u>	<u>Description of unconstitutionally obtained statements</u>
People v. Mora, 237 Cal.App.2d 770, 47 Cal.Rptr. 337, 340-341 (1965)	possession of heroin	statements as to source of heroin.
People v. Tagle, 238 Cal.App.2d 16, 47 Cal.Rptr. 434, 436-439 (1965)	murder	admission that defendant un- intentionally fired shots that killed deceased.
People v. Breen, 238 Cal.App.2d 164, 47 Cal.Rptr. 644 (1966)	murder	damaging admissions and con- fession of guilt on associated accessory charge.
People v. Gilbert, 63 Cal.2d 960, 47 Cal.Rptr. 909, 915-916, 408 P.2d 365 (1966), <i>cert. granted</i> , — U.S. —	murder, robbery, kidnapping	admissions of guilty knowl- edge by codefendant.
People v. Rodriguez, 238 Cal.App.2d 682, 48 Cal.Rptr. 117, 120 (1965)	possession of heroin for sale	exculpatory statements.
People v. Nerger, 238 Cal.App.2d 716, 48 Cal.Rptr. 148 (1965)	illegal dispensation of narcotics	admissions to "helping" peo- ple by furnishing certain nar- cotics.
People v. Garcia, 239 A.C.A. 51, 48 Cal.Rptr. 305 (1966)	possession of heroin	confession of defendant's wife, a codefendant.
People v. Smith, 63 Cal.2d 779, 48 Cal.Rptr. 382, 409 P.2d 222 (1966)	conspiracy, murder, attempted murder	admissions of one codefendant and confession of second co- defendant as against third defendant.
People v. Williams, 239 A.C.A. 35, 37 48 Cal.Rptr. 421 (1965)	armed robbery	codefendant's confessions (court trial).
People v. Thomsen, 239 A.C.A. 78, 88-89, 48 Cal.Rptr. 455 (1965)	robbery and conspiracy	exculpatory explanations; ad- missions of association with the robbers.

Citation	Crime charged	Description of unconstitutionally obtained statements
People v. Brice, 239 A.C.A. 196, 48 Cal.Rptr. 562, 567-571 (1966)	burglary	"clearly and tellingly incriminating" statement.
People v. La Vergne, 64 A.C.A. 275, 49 Cal.Rptr. 557, 560, 411 P.2d 309 (1966)	murder, robbery, and assault	exculpatory statements.
People v. Sylvester, 241 A.C.A. 46, 50 Cal.Rptr. 263, 266 (1966)	narcotics sale	"that's all there was" in response to question where the rest of the "stuff" (heroin) was.
People v. Crenshaw, 241 A.C.A. 381, 50 Cal.Rptr. 429, 434 (1966)	robbery	admission that victim "was one of his whores" required reversal of pimping conviction but not robbery conviction.
People v. Helms, 242 A.C.A. 528, 532, 536-537 (1966)	robbery, burglary, and assault	conflicting stories and admissions.

UNCONSTITUTIONAL COMMENT OR INSTRUCTION ON DEFENDANT'S FAILURE TO TESTIFY IN VIOLATION OF GRIFFIN V. CALIFORNIA, 380 U.S. 609 (1965)

Respondent, in its brief (p. 24) in *Chapman v. California*, No. 95, cites cases herein listed after a statement that "there is no question but that California courts have applied their harmless error rule to alleged constitutional errors such as a violation of the comment rule in a myriad of both reported and unreported cases." The citations only are included in this list without further description because the prohibited comments or instructions are generally so similar in the various cases.

*People v. Luckman*, 235 Cal.App.2d 75, 45 Cal.Rptr. 41, 44 (1965).

*People v. Parker*, 235 Cal.App.2d 100, 44 Cal.Rptr. 909, 912-13 (1965)

*People v. Davis*, 235 Cal.App.2d 214, 45 Cal.Rptr. 297 (1965)

*People v. Wozniak*, 235 Cal.App.2d 243, 45 Cal.Rptr. 222, 236-237 (1965)

*People v. Dougherty*, 235 Cal.App.2d 564, 45 Cal.Rptr. 528, 530 (1965)

*People v. Propp*, 235 Cal.App.2d 619, 45 Cal.Rptr. 690, 706-707 (1965)

*People v. Erb*, 235 Cal.App.2d 650, 45 Cal.Rptr. 503, 507-08 (1965)

*People v. Estrada*, 236 Cal.App.2d 221, 45 Cal.Rptr. 904 (1965)

(conviction reversed on other grounds)

*People v. De Leon*, 236 Cal.App.2d 530, 46 Cal.Rptr. 241, 242 (1965)

*People v. Huggins*, 236 Cal.App.2d 578, 46 Cal.Rptr. 199 (1965)

*People v. Butts*, 236 Cal.App.2d 817, 46 Cal.Rptr. 362 (1965)

(murder count only)



- People v. Collier, 237 Cal.App.2d 259, 46 Cal.Rptr. 887, 890 (1965)  
(as to defendant Collier)
- People v. Fontaine, 237 Cal.App.2d 320, 46 Cal. Rptr. 855, 865 (1965)
- People v. Boyden, 237 Cal.App.2d 695, 47 Cal. Rptr. 136, 139 (1965)
- People v. Cockrell, 63 Cal.2d 659, 47 Cal.Rptr. 788, 408 P.2d 116 (1965)  
(silence as admission)
- People v. Padilla, 240 A.C.A. 115, 49 Cal.Rptr. 340 (1966)
- People v. Phillips, 240 A.C.A. 206, 49 Cal.Rptr. 480, 484 (1966)
- People v. Bowman, 240 A.C.A. 360, 49 Cal.Rptr. 772 (1966)
- People v. Potter, 240 A.C.A. 687, 49 Cal.Rptr. 892, 899 (1966)
- People v. Culp, 241 A.C.A. 445, 50 Cal.Rptr. 471 (1966)
- People v. Helms, 242 A.C.A. 528, 537, 51 Cal. Rptr. 484 (1966)
- People v. Gills, 241 A.C.A. 868, 50 Cal.Rptr. 822 (1966)
- People v. Romero, 244 A.C.A. 564 (1966)

## APPENDIX B

### **Summary of the History, Purpose, and Principal Interpretations of the Harmless Error Rule of the California Constitution**

The harmless error rule of the California Constitution is that:

"No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Calif. Const. Art. VI, §4½.

The history, purpose, and principal California interpretations of the foregoing rule are as follows:

In 1906, Roscoe Pound, in a far reaching paper before the American Bar Association, stated that "the worst feature of American procedure is the lavish granting of new trials". Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ABA Rep. Pt. 1, 395, 413 (1906). See also 33 ABA Rep. 542, 545, n.1 (1908) (bibliography of other contemporary criticism).

Dean Pound's criticism prompted the ABA in 1907 to establish a Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation. See 31 ABA Rep. 505 (1907).

In 1908, the ABA Special Committee recommended that the following federal statute be enacted:

"No judgment shall be set aside, or new trial granted, by any court of the United States, in any case, civil or criminal, on the ground of misdirection of the jury

or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, in the opinion of the court to which application is made after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." 33 ABA Rep. 542, 550 (1908).<sup>1</sup>

The special committee's position at all times was that a court "decision should be according to the law of the land. But it should be no part of this law that every technical departure from a rule of practice or evidence should compel a new trial." 33 ABA Rep. at 544.

With ABA approval, 33 ABA Rep. 27, 33 (1908), the proposed statute was introduced in Congress in 1908, see 34 ABA Rep. 578, 579 (1909), and reintroduced, after minor modification in 1909. S. 4568, H.R. 14,552.<sup>2</sup> The ABA filed a supporting brief with the Congressional committees hearing the bill. The brief stated that the purpose of the bill was to stop "reversals for technical defects in the procedure below" and that its effect would be "to enact that the presumption shall be that the decision below was right," and that if it was erroneous in some detail the error did not affect the result. 35 ABA Rep. 624 (1910).

Contemporaneously with the introduction of and hearings on the ABA "technical error" bill in Congress, the 1911 California Legislature, at the instance of State Senator A. E. Boynton, proposed the following amendment to the California Constitution:

"No judgment shall be set aside, or new trial granted in any criminal case on the ground of misdirection of

<sup>1</sup> The language used was suggested by Order 29, Rule 6, of the Rules of the English Supreme Court of Judicature. See 35 ABA Rep. 614, 615 (1910).

<sup>2</sup> The modification, after hearings on the original proposal, was to delete the word "affirmatively" in the phrase "affirmatively appear that the error complained of resulted in a miscarriage of justice." 34 ABA Rep. 603, 61, 81 (1909).

the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, after an examination of the entire cause including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." 2 Calif. Stats. 1911, Res. ch. 36, p. 1798 (Sen. Const. Amdt. No. 26).

In describing the amendment, the California Supreme Court has stated that "while it had long been provided in our statutory law that judgments would not be reversed because of technical errors or defects which did not affect the substantial rights of the defendant (Pen. Code §§ 1258, 1404),<sup>3</sup> the courts nevertheless in reviewing convictions in criminal cases had generally followed the rule that prejudice would be presumed from error and upon that basis the defendant was 'entitled to a reversal of the judgment' . . . . [Citations omitted]. The constitutional amendment added a new concept calling for a determination by the court that the alleged error resulted in a 'miscarriage of justice.'" *People v. Watson*, 46 Cal.2d 818, 834, 299 P.2d 243 (1956).

In the official arguments to the voters,<sup>4</sup> Senator Boynton stated that: "The object of this amendment is to enable our

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<sup>3</sup> Footnote not in original.

California had adopted a technical error statute as early as 1850: "After hearing the appeal, the court shall give judgment without regard to technical error or defect, which do not affect the substantial rights of the parties." Calif. Stats. 1849-50, ch. 119, §531, p. 314. The foregoing statute was repealed in 1851 and a virtually identical statute was substituted. Calif. Stats. 1851, ch. 29, §§499, 696, p. 267. The statute was codified in the California Penal Code of 1872 and then provided and now provides that "after hearing the appeal, the Court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties." §1258.

<sup>4</sup> Arguments to the voters in California are important interpretive aids. *E.g., Baumbaugh v. County of San Diego*, 44 Cal.App.2d 898, 902, 113 P.2d 218 (1941). The arguments on Section 4½ are reprinted in full at the end of this Appendix.



courts of last resort to sustain verdicts in criminal cases unless there has been a miscarriage of justice, or, putting it in another way, its purpose is to render it unnecessary for the higher courts to grant the defendant in a criminal case a new trial for unimportant errors . . . . The necessity for this amendment lies in the fact that the constitution of California gives the courts of appeal and the supreme court jurisdiction, in criminal cases on appeal, on questions of law only. The reviewing power does not extend to questions of fact. In order to enable the higher courts to determine whether the errors committed by the trial court resulted in a miscarriage of justice, they must have the power to review the facts of the particular case."

Senator Boynton was aiming at such "purely technical points", *ibid.*, as the following: "In Missouri a case was reversed and the prisoner escaped conviction because the indictment alleged the deceased 'instantly died' instead of charging according to the ancient formula that he 'did then and there die.' In a Texas case the elimination of the letter 'r' from the word 'first' saved a murderer from the gallows, when his guilt was absolutely determined. In our own state a conviction for murder was set aside because the indictment failed to state that the man killed was a human being." *Ibid.*

Senator Birdsall also made clear in his supporting argument to the voters that the object of the amendment was to prevent reversals for such errors as omissions of a letter or unimportant word in an indictment, or "trifling inaccuracies" in rulings on evidence.

The California amendment was adopted by the voters on October 10, 1911. Its federal counterpart<sup>5</sup> was adopted by Congress in 1919 (40 Stats. 1181). In *Kotteakos v. United*

<sup>5</sup> 28 U.S.C. §2111 now provides: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

F.R. Crim. Proc. §52(a) provides: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

*States*, 328 U.S. 750, 758-69 (1946), the Court held that the federal harmless error rule did not excuse a variance between an indictment for one conspiracy and proof of several separate conspiracies. It carefully reviewed the history of the harmless error proposals originating with the ABA, and stated that "if, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress." 328 U.S. at 764-65.

The foregoing history demonstrates that no case can be made that a purpose of the amendment was to authorize California courts to dismiss violations of the United States Constitution as harmless.

The first important case under the new amendment was *People v. O'Bryan*, 165 Cal. 55, 130 Pac. 1042 (1913). O'Bryan had testified before the grand jury without being given the required prior warning of his state constitutional privilege not to incriminate himself. The grand jury testimony was nevertheless admitted at his trial for murder, O'Bryan was convicted and his conviction was affirmed by the California Supreme Court. Three judges stated that "it is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected," 165 Cal. at 65, but that any error affecting the defendant's privilege under the state constitution was harmless. Three other judges refused to concur in any statement that a violation of a constitutional right could be harmless but held that any error was cured when the defendant voluntarily repeated the same testimony at the trial. 165 Cal. at 68-70. Chief Justice Beatty did not participate. The split of the court and the non-participation of the Chief Justice left "the scope of the amendment, especially in regard to constitutional rights, . . . still open," Kidd, A.M., Note, 1 Calif. L. Rev. 375, 377 (1913). Furthermore, no federal constitutional rights was

then involved. *Twining v. New Jersey*, 211 U.S. 78 (1908). Compare *Malloy v. Hogan*, 378 U.S. 1 (1964) and *Griffin v. California*, 380 U.S. 609 (1965).

In 1914, section 41½ was amended to apply to civil cases as well as criminal cases and to clarify language relating to errors of pleading and procedure. See Calif. Stats. 1913, Res. ch. 48, p. 1681 (Sen. Const. Amdt. No. 12). Section 41½ now reads as quoted at the beginning of this summary.

In 1927, in *People v. Mahoney*, 201 Cal. 618, 627, 258 Pac. 607 (1927), the California Supreme Court made clear that "the fact that a record shows a defendant to be guilty of a crime does not necessarily determine that there has been no miscarriage of justice." The Court held that "in this case the defendant did not have the fair trial guaranteed to him by law and the constitution" because of the trial court's persistence in making disparaging comments. The Court accordingly reversed the judgment of conviction.

In 1945, in *People v. Sarazzawski*, 27 Cal.2d 7, 10-11, 161 P.2d 934 (1945), there was "no question that the evidence amply supports the verdict and judgment." The California Supreme Court, however, reversed, because "we find in the record several incidents which should not have occurred in a fair and orderly trial," namely the court's failure to stand by its representation that the defendant's new trial motion would be heard on a certain date and its instruction to the jurors during voir dire that they could keep mistakes in their answers secret. The Court again stated and followed the fundamental principle established in a line of prior California cases that "When a defendant has been denied any essential element of a fair trial, or due process, even the broad saving provisions of section 41½ of article VI of our state Constitution cannot remedy the vice and the judgment cannot stand . . . [Citations]." 27 Cal.2d at 11.

In 1951, the California Supreme Court assumed that the evidentiary use of an involuntary confession could be harmless, *People v. Stroble*, 36 Cal.2d 615, 623-24, 226

P.2d 330, but its position on this point was short-lived and rejected by the United States Supreme Court. *Stroble v. California*, 343 U.S. 181, 190 (1952).

Shortly after the *Stroble* case, the California Supreme Court, in *People v. McKay*, 37 Cal.2d 792, 798-800, 236 P.2d 236 (1951), held that section 4½ did not justify affirmance of convictions obtained in a county where the defendants had suffered unfair pretrial publicity even though there was "abundant evidence of guilt." The Court stated that "regardless of their guilt, however, they were entitled to a fair and impartial trial." 37 Cal.2d at 798.

In 1955, a thoroughly and scholarly analysis of the cases under section 4½ concluded that "there are matters which the appellate courts have excluded from the scope of the section. Article VI, section 4½ was never intended to abrogate, modify, lessen or otherwise imperil the fundamental liberties or rights of a citizen of the State of California." Stout, *Appellate Review of Criminal Convictions*, 43 Calif. L. Rev. 381, 388 (1955). At the time of this analysis, California had only recently adopted the exclusionary rule as a rule of evidence and not of constitutional law in illegal evidence cases. *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905 (1955), and no experience was available under the harmless error rule for such cases.\*

\* Later in 1955, however, the California Supreme Court reversed a defendant's convictions on two counts of extortion and one count of conspiracy because of the admission of illegally seized evidence as to those counts but affirmed the conviction on an additional extortion count on the grounds (1) that "the evidence, entirely independent of that illegally obtained, convincingly, if not overwhelmingly, establishes guilt," *People v. Tarantino*, 45 Cal.2d 590, 595, 290 P.2d 505 (1955) and (2) that the jury was presumed to have followed the court's instructions to keep the evidence separate as to each count, 45 Cal.2d at 597. Three justices dissented on the ground that the admission of the illegally obtained evidence was prejudicial on all counts. 45 Cal.2d at 604.

Since the exclusionary rule was then treated as a rule of evidence, however, rather than a constitutional rule, *People v. Cahan*, *supra*, 44 Cal.2d at 450-51, the *Tarantino* decision did not purport to hold that a violation of the United States Constitution could be dismissed as harmless. Furthermore, the reliance of the Court on the then



In 1956, the California Supreme Court, in one of the leading cases under section 4½, adopted the rule "that a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. \* \* \* [T]he test . . . , must necessarily be based upon reasonable probabilities rather than upon mere possibilities; otherwise the entire purpose of the constitutional provision would be defeated." *People v. Watson*, 46 Cal.2d 818, 836-37, 299 P.2d 243 (1956). The Court did not decide the applicability of section 4½ to violations of the United States Constitution but in reviewing the history it referred in dictum to the notion of the three judges in the 1913 *O'Bryan* case, *supra*, "that not every invasion of a constitutional right necessarily requires a reversal." 46 Cal.2d at 835.

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applicable analogy of error being prejudicial to one defendant but not to a codefendant has been cast in doubt by *People v. Aranda*, 63 Cal.2d 518, 524-27, 47 Cal.Rptr. 353, 407 P.2d 265 (1965) which held that error in admitting A's confession was prejudicial to his codefendant B even though the trial court had instructed the jury to consider the confession only against A.

"Much of the history of the California rule is reviewed in Justice Peters' opinion for the California District Court of Appeal in the *Watson* case, 288 P.2d 184 (1955) prior to the granting of a hearing by the California Supreme Court. The District Court of Appeal also stated that section 4½ "did not expressly or impliedly repeal other relevant sections of the Constitution. The fair trial and due process provisions of our Constitution, Art. I, § 13, of Cal. Const., cannot be ignored. The right, the constitutional right, to a fair trial is a right of the guilty as well as of the innocent. Of course, if a defendant commits a crime, he should be punished. But he should only be punished after having been convicted at a trial at which admissible evidence has been introduced before a jury, and after that admissible evidence has been evaluated by a jury in a fair trial. That is a fundamental concept in our system of law, one of the basic decencies that exists in our society in the relationship we

The probability test of the *Watson* case was a throwback to the personal viewpoint of Chief Justice Beatty in an earlier case that a miscarriage of justice "can only mean" the "conviction of a person who is probably innocent. For an opinion on a question of fact—the question of guilt or innocence of which we are given jurisdiction by the amendment—must have at least a probability to support it, not necessarily demonstration, of course, but necessarily the weight of the evidence." *People v. Fleming*, 166 Cal. 357, 384-85, 136 Pac. 291 (1913) (qualified concurring opinion). In the *Fleming* case, Chief Justice Beatty "never found the time to read the forty-four hundred pages of typewritten record even in the most cursory manner." *Ibid.*

The foregoing history reveals that although the California Supreme Court in dictum had indulged in the notion that a violation of constitutional rights could be dismissed

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have developed between government and the individual. A lawful inquiry into guilt or innocence, even that of an evil individual, cannot be permitted to degenerate into the unlawful process of permitting the prosecution to introduce inadmissible evidence materially and adversely reflecting upon the defendant, and then escape the effect of the error by the claim that such error was not prejudicial, because, forsooth, the admissible evidence sustains the conviction, and the appellate court cannot say with conviction that the defendant is innocent. If we are to give more than lip service to the constitutional guarantees of a fair trial and due process it must be the law that, where error appears, a defendant is entitled to a new trial unless the appellate court can say, with conviction, that the error, reasonably, could not have affected the verdict. Any other rule would deny to the defendant that fair trial that is inherent in our concept of due process of law." 288 P.2d at 194-95.

It should be noted that in *People v. Bostick*, 62 Cal.2d 820, 826, 44 Cal. Rptr. 649, 402 P.2d 529 (1965), Justice Peters later stated that California courts had held that erroneous denials of constitutional guarantees did not require reversal when not deemed prejudicial. The *Parham* case cited had by then established that proposition but the other cases cited did not involve an express denial of federal constitutional rights, e.g., *People v. Isby*, 30 Cal.2d 879, 894, 186 P.2d 405 (1947), and in some instances had preceded the adoption of section 4½. E.g., *People v. O'Brien*, 88 Cal. 483, 489-490, 26 Pac. 362 (1891).

as harmless and that individual justices had supported that view, the Court in its actual effective holdings, as in the *Mahoney*, *Sarazzawski* and *McKay* cases, had been faithful to the Constitution. When met squarely with the issue, the Court had refused to allow a violation of the Constitution to be dismissed as harmless.

The position of the California Supreme Court was reaffirmed again in 1963, when it reversed a murder conviction because the trial court had erroneously refused to give a manslaughter instruction despite evidence that would warrant a conviction of manslaughter and had thereby deprived the defendant of his "constitutional right to have the jury determine every material issue presented by the evidence." *People v. Modesto*, 59 Cal.2d 722, 730, 31 Cal. Rptr. 255, 230, 382 P.2d 33 (1963). The Court held that "regardless of how overwhelming the evidence of guilt may be, the denial of such a fundamental right cannot be cured by article VI, section 4½, of the California Constitution, for the denial of such a right itself is a miscarriage of justice within the meaning of that provision." *Ibid.*

Only a few months later, however, the California Supreme Court departed from the history and purpose of the California amendment and its own long-established position that the denial of a fundamental constitutional right is itself a miscarriage of justice. On September 12, 1963, despite the decision of the United States Supreme Court that the exclusionary rule for illegal evidence cases is a federal constitutional rule binding on the states, *Mapp v. Ohio*, 367 U.S. 643 (1961), the California Supreme Court bluntly and audaciously ruled that a violation of the United States Constitution could be dismissed by a California court as harmless. *People v. Parham*, 60 Cal.2d 378, 385-86, 33 Cal. Rptr. 497, 384 P.2d 1001 (1963), cert. denied, 377 U.S. 945 (1964). It thereupon affirmed the defendant's conviction for burglary and held that the evidentiary offer and use of the bloody fragments of a check that the police had brutally clubbed and choked out of the defendant in violation of the United States Constitution were nothing more than harmless blunders by the prosecution and the trial court.

Since the *Parham* case, there has been a parade of California cases sustaining convictions despite the use at trial of evidence unconstitutionally obtained in violation of the principles of *Mapp v. Ohio*, 367 U.S. 643 (1961), and *Escobedo v. Illinois*, 378 U.S. 478 (1965), and despite unconstitutional comments on the defendant's failure to testify. *Griffin v. California*, 380 U.S. 609 (1965). The cases include the instant one and are described in Appendix A.

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ARGUMENTS TO VOTERS, BEFORE ADOPTION ON OCTOBER 10,  
1911 OF HARMLESS ERROR RULE OF CALIFORNIA CONSTITUTION,  
ARTICLE VI, SECTION 4½.

*Statement of State Senator A. E. Boynton, Author of the  
Proposed Amendment:*

The object of this amendment is to enable our courts of last resort to sustain verdicts in criminal cases unless there has been a miscarriage of justice, or, putting it in another way, its purpose is to render it unnecessary for the higher courts to grant the defendant in a criminal case a new trial for unimportant errors. It is designed to meet the ground of common complaint that criminals escape justice through technicalities. It will be noticed that the amendment provides that no new trial shall be granted in a criminal case unless on an examination of the entire case (including the evidence) the error has resulted in a miscarriage of justice. The necessity for this amendment lies in the fact that the constitution of California gives the courts of appeal and the supreme court jurisdiction, in criminal cases on appeal, on questions of law only. The reviewing power does not extend to questions of fact. In order to enable the higher courts to determine whether the errors committed by the trial court resulted in a miscarriage of justice, they must have the power to review the facts of the particular case.

The American Bar Association has endorsed a proposed congressional enactment governing procedure in federal

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courts, which is practically the same as our proposed constitutional amendment, except that it would apply to civil as well as criminal cases. One of the branches of congress has already acted favorably upon such a bill. As was pointed out by Judge Curtis H. Lindley of San Francisco, in a recent address, the adjective branch of our law has not kept pace with the development of substantive law. The trial of a criminal is so hedged about with technicalities that it has grown almost impossible to convict one whose wealth is sufficient to enable him to employ counsel skilled in the technique of criminal law. Thus there has grown up two systems of law—one for the poor, the other for the rich. The pauper prisoner is subjected to the iniquities of the "third degree" to secure from him incriminating evidence, while the wealthy one is surrounded by a corps of defenders, whose skill in barricading their client behind technicalities is usually commensurate with the fees secured.

At the present time a trial judge is virtually nothing more than a referee. He exists merely for the purpose of seeing that contending counsel play the game according to technical rules, and like any contest of skill, victory comes to the advocate who is the best player. The duty of the trial judge is to proceed with the cause; he has no time to investigate numerous points of detail, and, naturally, during the course of a long trial he falls into some small error of procedure. When the appellate court at its leisure, and with the aid of partisan counsel, ferrets out the error, the case is reversed. Under the present conditions lawyers try their cases not so much on their actual merits, as to force technical errors in to the record. The reversal of the just conviction of a guilty man upon purely technical points is the prime cause of want of confidence in our courts. This want of confidence often results in mob violence on the part of a long suffering and outraged public. When a peculiarly atrocious crime has been committed the people have more faith in their own ability to cope with the situation, than in leaving it to the courts, to either reverse a conviction

on appeal, or delay execution so long that punishment is no longer a deterrent. In the English colonies not one criminal in the last seventy-five years has been snatched from the hands of the law. We have long since passed the day when it was possible to convict an innocent man; the problem which confronts us to-day is whether we can convict a guilty one. The absurd lengths to which courts have gone in the reversal of cases for immaterial errors is shown by the recital of a few examples:

In Missouri a case was reversed and the prisoner escaped conviction because the indictment alleged the deceased "instantly died" instead of charging according to the ancient formula that he "did then and there die." In a Texas case the elimination of the letter "r" from the word "first" saved a murderer from the gallows, when his guilt was absolutely determined. In our own state a conviction for murder was set aside because the indictment failed to state that the man killed was a human being.

Under the present system the expense of trying criminals is largely in excess of what it should be. This results from the frequent appeals and reversals of the decisions of the trial courts, and because of the great length of the record, due to the unnecessary and superfluous rulings which the trial judge is forced to make against the people and in favor of the accused, in his endeavor not to commit error that can be made the subject of appeal. It is always the chief aim of the attorneys for the defense to "get error into the record" for the sole purpose of securing a new trial or reversal on appeal. This fosters a spirit of contention in the trial of criminal cases, which draws the mind of the jury from the real issues. The adoption of the proposed constitutional amendment would remove these defects by eliminating the cause of frequent appeals. It would allow the appellate court to look at the facts of the particular case unhampered by any presumption or fiction, to see whether or not the accused was unjustly convicted. Justice and not the means of securing it, would be the object of investigation in such appeal. Judges would be enabled to rule im-

partially on points presented, secure in the knowledge that any immaterial errors not affecting the cause would be disregarded on appeal. By enabling the appellate courts to reverse a case only when injustice has been done by the verdict, a common-sense basis of appeal would be established and public confidence restored. Criminals knowing that one of the most fruitful sources of escape from the clutches of the law has been cut off, would hesitate before committing crime. The increase of crime would thus be checked, the number of appeals would be greatly reduced, the expense of trying cases would be greatly lessened, the culprits would be punished swiftly and with certainty. Similar legislation has already been adopted in New York, Wisconsin, and Oklahoma.

The proposed constitutional amendment was unanimously adopted by the California legislature. If it is adopted by the people it will go far toward improving our system of criminal procedure.

*Statement of State Senator E. S. Birdsall:*

This amendment, commonly called the Boynton amendment, is designed to render it impossible for the higher courts to reverse the judgments of our trial courts in criminal cases for unimportant errors. It is designed to meet the ground of common complaint that criminals escape justice through the technicalities of the law. It will be noticed that the amendment provides that no new trial shall be granted in a criminal case unless on an examination of the entire case (including the evidence) the error has *resulted* in a miscarriage of justice. The rule in California in the past has been that an error, committed in the course of the trial, must be presumed to have been prejudicial and a new trial must be granted, it matters not how guilty the party may be, and oftentimes when the result would have been exactly the same if the error had not been committed.

This amendment would permit a new trial only when the error itself *results* in a miscarriage of justice. The supreme court has held in 21 Cal. 344 that it is a fatal omission

to fail to state in an indictment for robbery that the property taken is not the property of the person charged, although the very word "robbery" itself conclusively implies this. In 56 Cal. 406 a conviction was set aside because the letter "n" was accidentally omitted from the word "larceny," though it is probable that no person in the wide world could have had any doubt as to the word intended. In 137 Cal. 590 a conviction for murder was set aside because the indictment failed to state that the man killed was a human being. In 62 Cal. 309 a conviction of murder was reversed because the trial court permitted a surgeon who had examined the wounds to testify as to the probable position of the deceased when the fatal shot was fired. This was in line with the doctrine announced in 47 Cal. 114 that "every error in the admission of testimony is presumed to be injurious unless the contrary clearly appears." Trial judges of long experience declare that it is almost wholly beyond human skill for the most able and conscientious judge, in the course of a long and busy trial extending over days or weeks to avoid trifling inaccuracies now and then in the thousand and one rulings that they are compelled to make on the spur of the moment.

The object of the amendment is to cure all such inaccuracies, and compel decisions in accord with the actual justice of each particular case. The greatest injury arising from the present system is not the technical reversals, but it is the constant burden under which trial courts labor, by reason of the technical rule above stated. Every judge knows that a new trial always means great expense and generally ends in an acquittal. They are, therefore, compelled, in order to save some justice for the people, to rule almost every point unfairly against the people and in favor of the accused.

This amendment would be a great help in the administration of the law by enabling judges to rule as freely in behalf of one side as the other, and in its fairness stop the growing impression that our judicial decisions are based on technicalities, and not on justice.





NOV 25 1966

**In the Supreme Court**

JOHN F. DAVIS, CLERK

**OF THE  
United States****OCTOBER TERM, 1966****No. 103****JOE NATHAN COOPER,***Petitioner,***VS.****THE PEOPLE OF THE STATE OF CALIFORNIA,***Respondent.***On Writ of Certiorari to the Supreme Court  
of the State of California****BRIEF FOR THE RESPONDENT****THOMAS C. LYNCH,**

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**In the Supreme Court**  
**OF THE**  
**United States**

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OCTOBER TERM, 1966

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No. 103

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JOE NATHAN COOPER,

*Petitioner,*

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,  
*Respondent.*

On Writ of Certiorari to the Supreme Court  
of the State of California

**BRIEF FOR THE RESPONDENT**

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**OPINION BELOW**

The opinion of the California District Court of Appeal for the First Appellate District and the order of the Supreme Court of California denying a hearing are reported in 234 Cal.App.2d 587, 44 Cal. Rptr. 483 (R. 257-276).

### **JURISDICTION**

Jurisdiction is conferred on this Court by Title 28, United States Code, section 1257(3).

The judgment of the District Court of Appeal was entered on May 24, 1965. The Supreme Court of California denied a hearing by an order entered on July 21, 1965.

A timely petition for writ of certiorari was filed in this Court. The petition for certiorari was granted on April 18, 1966, in 700 Misc. O.T. 1965, 384 U.S. 904.

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### **STATUTES INVOLVED**

Relevant statutes and constitutional amendments, federal and state, are set forth in the Appendix.

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### **QUESTIONS PRESENTED**

1. Can a state court apply the harmless error rule to a conviction involving the use of illegally obtained evidence, and, if so, was the error here harmless?
2. Was the search of the vehicle several days after the arrest without a warrant but while the vehicle was in the custody of the state, having been lawfully seized pursuant to the state narcotic laws, reasonable under the Fourth Amendment?
3. Was petitioner denied the right of confrontation under the Constitution of the United States because the prosecution did not call the informant

as a witness, although his identity was disclosed and he was made available to the defense, and has this question been raised and pursued through the state courts so as to permit review by this Court?

### STATEMENT

Petitioner was indicted and convicted of selling heroin on December 21, 1961, and of committing an assault on that date. The convictions were affirmed by the District Court of Appeal. At trial, Cooper admitted two prior felony convictions, for drunk driving (R. 242), and for selling marijuana (R. 240).

On December 21, 1961, at about 6:00 a.m., Frank Green was arrested in Richmond, California, by state narcotic agents and a municipal police officer for selling heroin (R. 45). Green was interrogated at the Richmond Police Department (R. 46). He agreed to act as an informant. Green's person and clothing were thoroughly searched at the time of his arrest (R. 45, 77) and again at the police station at about noon of the same day (R. 46, 58).

After completion of the second search, Green was furnished with twenty dollars in marked money (R. 46). State narcotic agent Armenta and federal narcotic agent Lee then took Greer to a public telephone booth in downtown Richmond (R. 47). Shortly after 12:30 p.m. (R. 46), Green and Armenta entered the telephone booth together. Armenta attached a twin phone listening device to the telephone receiver (R.



47). Green dialed the number of petitioner Joe Cooper's residence (R. 73). A woman answered and Green asked for "Joe." "Joe" was called to the phone. Green asked, "How about a deuce?" "Joe" said, "Yes." At Green's suggestion the two agreed to meet right away at Newell's Market (R. 49). Agent Armenta recognized "Joe's" voice as that of petitioner Joe Cooper (R. 49). Armenta testified that "deuce," in the narcotic trade, refers to bindles or capsules of heroin (R. 50).

On this date petitioner resided at 536 South 20th Street in Richmond (R. 104). Richmond vice squad officer Stumpf, who had participated in the early morning arrest of Green, and state narcotic agent Yates had petitioner's residence under surveillance while the recited telephone conversation was occurring (R. 177-178). Stumpf and Yates watched from a car located on 19th Street, immediately north of Cutting Boulevard. Both could observe petitioner's house on 20th Street across the intervening vacant corners (R. 177). At about 12:50 p.m. Stumpf saw a person that fit Cooper's description emerge from petitioner's house, walk to the 1957 blue Oldsmobile parked in the front, do something with the car trunk for two or three minutes, then drive north to Cutting, east to 22nd Street and then South on 22nd Street (R. 180).

Newell's Market was located on the southwest corner of 23rd and Cutting (R. 50). Adjacent to the market on the west side, extending westerly along Cutting to 22nd Street, was a large parking lot (R. 51). After Green completed his telephone call, he was

driven by Armenta and Lee to 23rd and Virginia Streets, one block north of the market (R. 50). Green got out of the car there. Armenta left the vehicle a short distance away (R. 51). Both proceeded to the front of Newell's Market. Green approached it on the west side of 23rd Street and Armenta on the east side, crossing Cutting and 23rd Street to the front of the market (R. 52). All during this time Armenta saw that Green contacted no one (R. 52).

Agent Armenta watched Green walk into the parking lot (R. 52). Armenta next observed Cooper, whom he identified, drive into the parking lot from 23rd and Cutting, alone in a 1957 blue Oldsmobile (R. 53). After losing sight of Green for two or three minutes, Armenta saw him leave the lot and return to the vicinity of 23rd and Virginia, where Agent Lee waited (R. 54). Armenta stated that Green was in the parking lot some five minutes altogether, and after Cooper's car entered the lot it was "Just a couple of minutes, one or two," until Green emerged (R. 64).

Standing in front of the market, Armenta observed state narcotic agent Groom, who had taken a position with Richmond Police Lieutenant Sullivan in a service station on the northeast corner of 23rd and Cutting, diagonally across from Newell's Market (R. 54). Armenta watched Groom leave the service station, cross 23rd Street, and proceed to the north side of Cutting to a position which offered a vantage point on the parking lot (R. 54).

Groom and Sullivan observed Green and Armenta in the telephone booth and accompanied them to the

market in a separate vehicle (R. 78-79). Parked in the service station, they saw Armenta and Green approach the market (R. 80). Groom then left the service station, and proceeded to the porch of a house fronting on 23rd Street. From this location Groom enjoyed a clear view of the front of the market and of the easterly half of the parking lot (R. 82, 121). He testified that he could see Armenta and Green and continued to watch Green (R. 83). Shortly, Green walked out into the parking lot from a position close to the wall of the building (R. 84). At this point, Groom left the porch and moved to a new vantage point alongside the house. From there he could view the entire parking lot (R. 84). He subsequently observed Green approach "the Oldsmobile, which I recognized as the car that Joe Cooper usually drove, and talk to a man in that car who appeared to me to be Joe Cooper." (R. 84). Green stood by the driver's side of the car for a minute or more and then walked out of the lot up 23rd Street to Virginia (R. 84). Groom continued to watch Green until the informant came into Agent Lee's view (R. 84).

Officer Stumpf and Agent Yates saw Cooper depart from his house in a 1957 Oldsmobile (R. 180, 188). Yates radioed this information to Lieutenant Sullivan, who remained parked in the service station (R. 180). After receiving this message, Sullivan saw Cooper's Oldsmobile, which he recognized, enter the parking lot. Green approached the car, sat in the front seat with Cooper for a few minutes, then got out and walked back toward 23rd Street (R. 140). Sullivan testified that the only person in the Oldsmo-

bile when it entered the lot "appeared to me to be Joe Cooper" (R. 140). He had seen Cooper in a car about two weeks earlier (R. 140). Sullivan indicated that, save for momentary interruptions by passing cars, he had Green under constant surveillance while Green was in the parking lot (R. 150).

Agent Yates and Officer Stumpf drove to the market area. Yates saw in the Newell parking lot Green leaving the same car and driver which he saw depart from Cooper's residence (R. 189).

Green returned to Agent Lee's automobile and handed Lee, in Agent Armenta's presence, a small brown packet (R. 157). The three men thereupon returned to the Richmond Police Department, (R. 55, 158). This package consisted of two white paper bindles of heroin wrapped in brown wrapping paper of the variety used in grocery bags (R. 157). A field test of the contents of the package indicated a possible opium derivative (R. 161-162).

Groom and Sullivan followed Cooper as he left the parking lot, but lost him on 26th Street (R. 85). They then returned to the Richmond Police Department (R. 158). Cooper thus had considerable opportunity to dispose of the marked bills. The authorities next attempted to find Cooper's car. His Oldsmobile was located at 7th and Macdonald in Richmond at 2:15 p.m. on December 21. It was kept under surveillance until about 3:45 p.m. when Cooper walked toward the car with a woman and two children (R. 159). Groom and Yates arrested Cooper as the petitioner started to unlock his car. Groom took Cooper's



right wrist, and Cooper said, "It's there in the car over the sun visor" (R. 89). Asked what was there, Cooper responded, "The marijuana cigarettes. But I didn't put them there, someone else put them there." (R. 89).

Cooper then put his left hand into his right shirt pocket, removed an object wrapped in brown paper, and began to place it in his mouth (R. 89-90). Agent Groom thought the object was a package of heroin (R. 117). Groom and Yates grabbed Cooper's left arm; Groom grabbed Cooper's hand. Cooper put both the package and Groom's hand into his mouth, and stubbornly chewed both (R. 90). Shouting in pain to Cooper to release his finger (R. 182), Groom took hold of Cooper's nose (R. 97), and after a scuffle, managed to extract his severely lacerated finger (R. 90) from Cooper's month (R. 199). Cooper apparently succeeded in swallowing the package (R. 90). Cooper was subdued and taken as a state prisoner to the police station (R. 199).

Cooper's Oldsmobile was seized and impounded pursuant to California Health and Safety Code section 11611. The automobile, Cooper, and his female companion were searched. However, the marked money furnished Green was not found (R. 106-107).

About one week after Cooper's arrest, Agent Groom made a cursory search (R. 103) of petitioner's Oldsmobile at the Beacon Tow Service in Richmond. He found in the glove compartment a three inch by five inch (R. 131) piece of brown paper. It appeared to have been torn from an ordinary grocery bag (R.

170). This piece of paper, together with two bindles of heroin and a smaller piece of brown paper in which the bindles came wrapped, formed People's Exhibit Four. No mention of the paper removed from Cooper's car was made during direct examination of Groom. It was first brought up during Groom's cross-examination (R. 114). On redirect, the prosecution elicited from Groom the circumstances of its seizure (R. 130). Over petitioner's objection that a proper chain of custody had not been established, this piece of paper was admitted in evidence as part of Exhibit Four (R. 171).

Cooper was charged by indictment with selling heroin and with assault by means of force likely to produce great bodily injury (R. 23). An amended indictment filed at trial charged the same offenses and in addition charged two prior convictions of felonies (R. 28). Petitioner admitted the priors (R. 242) and pleaded not guilty to the charges of assault and sale of heroin (R. 27). Petitioner waived jury trial (R. 43).

On April 4, 1962, Groom made another search of Cooper's impounded automobile. He discovered a single marijuana seed in the interior of the vehicle. When the prosecuting attorney offered this seed in evidence, the trial court inquired, "Might I ask the relevancy of this . . . ? It's outside of the issues." (R. 101). However, the seed itself was received in evidence without objection. The trial court then denied a motion to strike Groom's testimony pertaining to the finding of the seed, remarking, "As I say, very

frankly, I don't think it has any great weight." (R. 102).

Cooper was the sole defense witness. He denied the sale and denied meeting Green at Newell's Market on December 21 (R. 211-212). He also denied agreeing to meet with Green at the market on that date (R. 222). Cooper stated that he was not at home when the telephone call in question was made (R. 212). Petitioner, previously convicted for a sale of marijuana (R. 242), testified that the narcotic term "deuce" was meaningless to him (R. 222-223). Cooper did not recall biting Groom's finger (R. 215-216).

Informant Green, who was made available to the defense (R. 208), did not testify. Cooper claimed that about two weeks prior to his arrest he and Green fought over a gambling debt (R. 210).

After the People had rested their case, petitioner moved for dismissal. Denying the motion, the trial judge declared: "I see no reason . . . to disbelieve at this point the basic testimony of the officers. I have no doubt that the defendant was out there. I have no doubt that Green was out there. I have no doubt that the contact was made. The two bindles are here." (R. 208).

The trial court subsequently found Cooper guilty of selling heroin. In summarizing the evidence against petitioner, the court made no reference to the piece of brown paper which Agent Groom removed from Cooper's car after it had been impounded (R. 242). Cooper was also found guilty of simple assault (R. 245). He was sentenced to be imprisoned for the term



prescribed by law for the narcotics offense (R. 250). He was sentenced to six months in the County Jail for the assault, the sentences to run concurrently (R. 252).

The conviction was affirmed by the California District Court of Appeal. The District Court found Groom's search of the automobile to be illegal (R. 267) and the evidence thereby obtained—the scrap of brown paper—to be inadmissible. After reviewing the remaining evidence (R. 270), the appellate court concluded that the resultant error was harmless, whether judged by the standard announced in *People v. Watson*, 46 Cal.2d 818, 299 P.2d 243 (1956), or by that articulated in *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963) (R. 270).

Cooper petitioned for a hearing in the Supreme Court of California. Here, for the first time, he raised the issue of an unconstitutional denial of his right of confrontation and cross-examination. The petition was denied (R. 276).

#### SUMMARY OF ARGUMENT

The judgment should be affirmed since any error in receiving illegally seized evidence was harmless. Since the prejudicial effect of erroneously admitted evidence turns not on the manner of obtaining the evidence but on the nature of such evidence and since the use of illegally seized evidence does not result in the denial of a fair trial, there is no necessity to apply a rule requiring reversal in all cases regardless.



of the nature of the evidence. The creation of a reversible per se rule in illegally obtained evidence cases would be contrary to all state and most federal decisions on the question, and it would strike down, at least in part, the harmless error rule of every state, as well as that enacted by Congress. Moreover, the creation of a reversible per se rule would not have a deterrent effect on any illegal police practices, nor should such a rule be based on the unwarranted assumption that state and federal appellate courts will rely on the harmless error rule to circumvent rights guaranteed by the United States Constitution.

Since a standard of harmless error may be applied to illegally seized evidence cases, the California standard of harmless error may properly be applied. The California standard is valid under the Fourteenth Amendment since it adequately protects federal constitutional rights. Since the California rule is valid, the reliance by the state appellate court upon that rule constitutes an independent and adequate state ground of decision. Moreover, such a ground for decision should be respected in federal habeas corpus proceedings.

No matter what standard of harmless error is applied in this case, it is manifest that the brown scrap of paper received in evidence did not prejudice the petitioner so as to require a reversal.

Secondly, the necessity for the state appellate court to consider and apply the state harmless error rule turned on the determination by that court that the brown scrap of paper had been secured in a search

and seizure that was unreasonable under the Fourth Amendment to the United States Constitution. We submit that the state court erred in this conclusion. The search of a vehicle which is lawfully in the custody of the law enforcement officials from the time of seizure is not an unreasonable search. The reasonableness of the search is even more clear when the vehicle is lawfully seized and impounded pursuant to a valid narcotic forfeiture law.

Finally, the claim that petitioner was denied his right of confrontation under the Sixth Amendment is without substance. The claim was never presented to the state intermediate appellate court, which is the highest court of the state for the purposes of this proceeding. Nor is there any adequate excuse for this failure. On the merits, petitioner has no valid claim. No hearsay evidence of any consequence was used against him. The informant, whose conduct as testified to by the investigating officers is the basis for the claim here, was identified to the petitioner and made available at the trial for such action as he deemed proper. There was no duty on the prosecution to call the informant as a witness since all material facts were developed through other witnesses.

## ARGUMENT

### I

**THE STATE APPELLATE COURT PROPERLY HELD THAT WHILE SOME EVIDENCE THAT WAS THE PRODUCT OF AN ILLEGAL SEARCH AND SEIZURE WAS ERRONEOUSLY RECEIVED IN EVIDENCE THE ERROR WAS HARMLESS.**

The Fourteenth Amendment to the United States Constitution does not require that state appellate courts apply a prejudicial error per se rule to criminal convictions in which evidence has been received which is the product of an unreasonable search and seizure. The state appellate courts are free to measure the question of prejudice by the state rule governing appellate review so long as that state standard is itself valid under the federal Constitution. Finally, no matter what standard of appellate review is applied to the case at bar, there was no prejudice to petitioner and the judgment should be affirmed.

- A. The Fourteenth Amendment to the United States Constitution Does Not Require That a Prejudicial Error Per Se Rule Be Applied to Every Case in Which Evidence Is Received Which Is the Product of an Unlawful Search and Seizure.**

The decisions of this Court have not required that the state or federal appellate courts apply a prejudicial error per se rule to criminal convictions where evidence may have been received which was the product of an unreasonable search and seizure.

The Court has not accepted the doctrine urged by the petitioner, to wit, that every constitutional error must result in a reversal. Instead, the Court has appraised the effect of the error when the error involved

the reception of evidence, such as in the coerced confession cases, and required a reversal, not because of the nature of the error, but because of the effect upon the jury or the trier of fact of the particular error. Where the constitutional error has related to procedural due process and impaired the reliability of the fact finding process, the Court has insisted upon reversal.

The reception of evidence which is the product of an unlawful search and seizure, however, does not necessarily have the prejudicial effect of a coerced confession, nor does it impair the reliability of the fact finding process, and result in a denial of due process of law.

The state appellate courts are unanimous and the federal appellate courts nearly so in recognizing that the Constitution does not require them to apply a prejudicial error per se rule to a criminal conviction because of the reception of illegally obtained evidence when that evidence is not prejudicial to the defendant.

Should this Court depart from its own precedents and the view of the state and federal appellate courts and require that a prejudicial error per se rule be applied in such cases, the Court would in effect hold the federal harmless error rule, as adopted by Congress, unconstitutional and the harmless error rule of all of the states, most of which have been adopted by the people or by legislative action, unconstitutional. This mass undoing of the will of Congress, the will of the state legislatures, the will of the state appellate judges, and indeed the will of the people, would reject



the hard learned teachings of history and would accomplish no useful purpose.

A prejudicial error per se rule would not deter violations of the Fourth Amendment in connection with illegal search and seizure cases. And to the extent that a prejudicial error per se rule might be based upon the fear that state appellate judges and federal appellate judges would rely on the harmless error rule to circumvent the protection of the United States Constitution, we submit that this fear is false, wholly unwarranted, and a reflection upon the integrity of the system for the administration of justice throughout the United States.

1. The Decisions of This Court Do Not Require That Any Prejudicial Error Per Se Rule Be Applied by State and Federal Appellate Courts to the Reception of Illegally Obtained Evidence When That Evidence Is Not Prejudicial.

After arguing that the evidence in question here constituted reversible error under the test announced in *Fahy v. Connecticut*, *supra*, petitioner argues that, regardless of prejudice, this Court should apply what he calls "the accepted rule" that unconstitutional error requires a reversal, regardless of the nature of the error, regardless of the effect of the error in the particular case, and regardless of its effect on the reliability of the fact finding process (Brief for the Petitioner 24). Such a rule, in requiring a reversal in every case in which evidence was erroneously received when that evidence was the product of an unreasonable search and seizure, would strike down a vital segment of the settled constitutional and statutory law of the United States and the fifty states. This

doctrine, if accepted, would impose a great threat to the administration of justice in the United States.

We find no such "accepted rule" in the decisions of this Court. On the contrary, we find in the thread of the decisions a willingness to accept reality, to appraise the effect of erroneously received evidence, to appraise the effect of a rule of procedure, and a willingness to permit appellate judges to act as judges and not automatons.

- a. *Fahy v. Connecticut* did not apply the prejudicial error per se rule to the reception of illegally obtained evidence.

In *Fahy v. Connecticut*, *supra*, 375 U.S. 85 (1963) the majority of this Court, in an opinion by Mr. Chief Justice Warren, left the specific question open:

"On the facts of this case, it is not now necessary for us to decide whether the erroneous admission of evidence obtained by an illegal search and seizure can ever be subject to the normal rules of 'harmless error' under the federal standard of what constitutes harmless error. Compare *Ker v. California*, 374 U.S. 23." *Id.* at 86.

However, the Court went on to decide that the evidence was in fact prejudicial. Therefore, the error was not harmless and the conviction was reversed.

The question of harmless or reversible error was framed as follows:

"The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. To decide this question, it is necessary to review the facts of the case and the evidence adduced at trial." *Id.* at 86-87.

The majority of the Court then proceeded in effect to apply a harmless error standard to the facts of the case. It is not material at this juncture whether the rule as stated is substantially the same as, or different from, the California harmless error rule. The point is that the Court clearly refused to hold that the mere admission of the evidence in itself required a reversal. Instead, the Court stated the rule of appellate review that it would apply and then it proceeded to do what every state and federal appellate court does when confronted with this same question, that is, review the facts of the case and the evidence adduced at trial and determine whether the error is prejudicial or harmless.

The petitioner and his co-defendant were convicted of having painted swastikas on a synagogue. The majority of the Court identified the evidence which was erroneously admitted—a can of black paint and a paint brush found in Fahy's car—and examined its effect upon the other evidence and the conduct of the defense.

“Examining the effect of this evidence upon the other evidence adduced at trial and upon the conduct of the defense, we find inescapable the conclusion that the trial court's error was prejudicial and cannot be called harmless.” *Id.* at 87.

The majority of the Court considered the effect of the inadmissible evidence itself:

“Obviously, the tangible evidence of the paint and brush was itself incriminating. In addition, it was used to corroborate the testimony of Officer Lindwall as to the presence of petitioner near the

scene of the crime at about the time it was committed and as to the presence of a can of paint and a brush at petitioner's car at that time." *Id.* at 88.

The majority of the Court examined in detail the findings of the trial judge. He had found that the police found the same can of black paint and the brush in the car which the defendants had been operating when stopped by the officer earlier in the morning. The Court evaluated the effect of the inadmissible evidence upon the otherwise admissible evidence, that is, the officer's testimony as to the stopping of the car and what he had observed at that time.

"It can be inferred from this that the admission of the illegally seized evidence made Lindwall's testimony far more damaging than it would otherwise have been." *Id.* at 88-89.

The majority of the Court noted other effects of the inadmissible evidence. It had been used as the basis of opinion testimony to the effect that the paint and brush matched the markings on the synagogue. Thus, "... forging another link between the accused and the crime charged." *Id.* at 89. After noting that the trial court had made a specific finding that the paint brush which was illegally obtained matched the markings made with black paint on the synagogue, the Court observed:

"In relation to this testimony, the prejudicial effect of admitting the illegally obtained evidence is obvious." *Ibid.*

Moreover, admissions by Fahy were used against him at trial. After examining the evidence and the



manner of securing the admissions, the Court considered the effect of the illegally obtained evidence upon those admissions and concluded:

"Thus petitioner should have had a chance to show his admissions were induced by being confronted with the illegally seized evidence." *Id.* at 91.

Finally, another "indication of the prejudicial effect of the erroneously admitted evidence," *ibid.*, was pointed to. The majority of the Court observed that it was only after admission of the paint and brush and the use of this evidence to corroborate the other evidence and after introduction of the confession, that the defendants took the stand and admitted their conduct and tried as a matter of defense to establish that the nature of those acts was not within the scope of the felony statute under which they had been charged.

It cannot be disputed that the majority of the Court did in effect apply a harmless error rule in *Fahy*. It applied that rule in the same manner that the state and federal appellate courts apply their own harmless error rules, that is, by a painstaking and careful analysis of the record and the effect of the erroneously admitted evidence upon the proceedings of the trial.

The majority of the Court does expressly reject any harmless error test founded simply on the question of independently sufficient evidence:

"We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of." *Id.* at 86.

Of course, no such rule is applied in California and it seems reasonably well settled that any such rule would be an inadequate standard of appellate review.

Four justices of this Court dissented from the majority opinion. The dissenting opinion was authored by Mr. Justice Harlan. This opinion does not suggest that any automatic reversal rule be applied. On the contrary, the opinion of Mr. Justice Harlan expressly decides the question left open by the majority opinion:

"This brings me to the question which the Court does not reach: Was it constitutionally permissible for Connecticut to apply its harmless-error rule to save this conviction from the otherwise vitiating effect of the admission of the unconstitutionally seized evidence? I see no reason why not." *Id.* at 94.

Mr. Justice Harlan did not deem it necessary to determine whether a state or federal standard of harmless error should govern since the Connecticut standard applied was as strict as any possible federal standard. *Id.* at 95, n. 2.

b. *Stoner v. California* did not apply the prejudicial per se rule.

In *Stoner v. California*, 376 U.S. 483 (1964), the Court held that the illegally obtained evidence was prejudicial.

"But the conviction depended in large part upon the jury's resolution of the question of the credibility of witnesses, and that determination must almost certainly have been influenced by the incriminating nature of the physical evidence il-

legally seized and erroneously admitted." 376 U.S. at 490 n. 8.

Justice Harlan dissented from the disposition of the case, stating that he would remand the case to the California District Court of Appeal so that it might consider whether or not admission of the illegally seized evidence was harmless error. *Id.* at 490-491.

Thus in *Stoner*, as in *Fahy*, the majority of this Court refused to apply the prejudicial error per se rule to the question of whether a criminal judgment should be reversed, illegally seized evidence having been received at trial.

- c. This Court has applied the harmless error rule to violations of constitutional rights which did not prejudice the defendant.

In applying a rule of appellate review which requires a showing of prejudice for reversal and in appraising the effect of the inadmissible evidence upon the entire course of the proceedings at trial, the Court in *Fahy v. Connecticut* was only carrying out the principles announced and applied in many prior decisions of this Court.<sup>1</sup>

<sup>1</sup>Petitioner cites *Kremen v. United States*, 353 U.S. 346 (1957), for the proposition that: "Even before *Mapp v. Ohio*, *supra*, the admission of illegal evidence of arguably negligible value required a reversal." Brief for the Petitioner 31. *Kremen*, however, lends no support to this proposition. The opinion of the Court discusses only the question of whether the search and seizure which produced the evidence complained of was unreasonable. The dissenting opinion states that the harmless error rule should be applied. Neither opinion, however, discusses the possible effect of the illegally seized evidence in the light of the other evidence admitted, and it therefore cannot be determined whether there was any basis for saying that the error in admitting the evidence was harmless.

In *Motes v. United States*, 178 U.S. 458 (1900), this Court unanimously applied the harmless error rule to a federal criminal judgment in which evidence had been received in violation of the defendant's rights under the Sixth Amendment to the United States Constitution. Several defendants were tried for conspiracy to violate federal civil rights. Taylor, one of the defendants, confessed and testified to the killing at the preliminary hearing. Federal officials negligently allowed him to escape before trial. At the trial, his testimony was read into the record. Motes testified that he and Taylor had done the killing. All defendants were convicted and appealed. The judgment was reversed as to the other defendants but affirmed as to Motes.

This Court held that the use of Taylor's statements violated the Sixth Amendment rights of all the defendants, but did not prejudice Motes because of his judicial confession, which was regarded as conclusive evidence of guilt.

"We can therefore say, upon the record before us, that the evidence furnished by Taylor's statement was not so materially to the prejudice of Columbus W. Motes as to justify a reversal of the judgment as to him. It would be trifling with the administration of the criminal law to award him a new trial because of a particular error committed by the trial court, when in effect he has stated under oath that he was guilty of the charge preferred against him." *Id.* at 476.

A similar rule was applied by this Court in reviewing a state conviction in which there was a violation,



of the defendant's right to be present during the proceedings, a right at that time deemed analogous to the rights conferred by the Sixth Amendment. Even though the defendant was not permitted to be present at a viewing of the scene of the offense by the jury, although his attorney was present, this Court affirmed a murder conviction with a death sentence on the ground that no prejudice was shown. *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

Similarly, violations of the defendant's privilege under the Fifth Amendment, as implemented by federal statute, have been held not to constitute reversible error per se, but to be subject to the waiver doctrine (*Johnson v. United States*, 318 U.S. 189 [1943]) and to be subject to a form of the harmless error rule. *Wilson v. United States*, 149 U.S. 60 (1893). See also *Cloud v. United States*, 361 F.2d 627 (8th Cir. 1966); *United States v. Knox Coal Co.*, 347 F.2d 33 (3rd Cir. 1965); *Coleman v. Denno*, 223 F. Supp. 938 (S.D.N.Y. 1963), *aff'd. sub nom. United States v. Denno*, 330 F.2d 441 (2d Cir. 1964).

- d. The rule of reversal in involuntary confession cases does not require reversal in illegally seized evidence cases.

There is nothing inconsistent between the application of the harmless error rule in search and seizure cases—as in *Fahy* and *Stoner*—and the generally accepted rule that the use of an involuntary confession requires reversal regardless of other evidence of guilt.

Bear in mind that the so-called "harmless error rule" is only part of a rule. It is one aspect of the

rule of appellate review generally accepted throughout the United States which provides a test in general terms of prejudice for determining whether an error calls for reversal or affirmance. Sometimes the rule calls for reversal; sometimes it calls for affirmance. But in arriving at this result, the rule takes as controlling the effect of any inadmissible evidence. Consequently, the California harmless error rule recognizes that the use of an involuntary confession requires reversal regardless of other evidence of guilt and that appellate courts cannot inquire into the prejudicial nature of it. *People v. Dorado*, 62 Cal.2d 338, 398 P.2d 361, cert. denied, 381 U.S. 937, 946 (1965); *People v. Matteson*, 61 Cal.2d 466, 393 P.2d 161 (1964).

Thus California applies as an integral part of its rule of appellate review the doctrine announced in many cases by this Court that the reception into evidence of an involuntary confession requires reversal, without regard for the truth or falsity of the confession and even though there is ample evidence aside from the confession to support the conviction. *Jackson v. Denno*, 378 U.S. 368, 376 (1964); *Haynes v. Washington*, 373 U.S. 503, 518-519 (1963); *Lynum v. Illinois*, 372 U.S. 528 (1963); *Rogers v. Richmond*, 365 U.S. 534 (1961); *Stroble v. California*, 343 U.S. 181, 190 (1952); *Malinski v. New York*, 324 U.S. 401, 404 (1945); *Lyons v. Oklahoma*, 322 U.S. 596, 597, n. 1 (1944).

We think that the reason for the rule of prejudicial error per se in regard to involuntary confessions has

been expressed very well by Chief Justice Traynor of the California Supreme Court:

"Almost invariably, however, a confession will constitute persuasive evidence of guilt, and it is therefore usually extremely difficult to determine what part it played in securing the conviction. (See *Payne v. Arkansas*, 356 U.S. 560, 568 [78 S.Ct. 844, 2 L.Ed.2d 975, 981]; Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 Sup.Ct.Rev. 1, 45; cf. *Hamilton v. Alabama*, 368 U.S. 52, 55 [82 S.Ct. 157, 7 L.Ed.2d 114, 116-117].) These considerations justify treating involuntary confessions as a class by themselves and refusing to inquire whether in rare cases their admission in evidence had no bearing on the result." *People v. Parham*, 60 Cal.2d 378, 385, 384 P.2d 1001, 1005 (1963), cert. denied, 377 U.S. 945 (1964).

This view, which predicates the rule on the inherently prejudicial effect of a confession during a trial, finds express support in *Payne v. Arkansas*, 356 U.S. 560, 568 (1958):

"[W]here, as here, a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession." See also *Stroble v. California*, 343 U.S. 181, 190 (1952).

Mr. Justice Harlan has expressed the same view:

"Cases in which this Court has held that the sufficiency of other evidence will not validate a conviction if an unconstitutionally obtained confession is introduced at trial, e.g., *Malinski v.*

*New York*, 324 U.S. 401, are inapposite. It may well be that a confession is never to be considered as nonprejudicial." *Fahy v. Connecticut*, *supra*, 375 U.S. at 95 (dissenting opinion).

Petitioner attempts to meet this analysis of the coerced confession cases by bluntly asserting that the coerced confession cases are not in a class by themselves. He points to other situations in which the United States Supreme Court has reversed involving constitutional or statutory questions.<sup>2</sup> He also suggests

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<sup>2</sup>Several cases cited by petitioner lend no support to the proposition that reversal is required in every case of conviction wherein a procedural right guaranteed by the Constitution has been denied.

The quotation from *Miranda v. Arizona*, 384 U.S. 436, 468 (1966), to the effect that: "The Court 'will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given,'" Brief for the Petitioner, 27, has nothing to do with harmless error, but merely lays down a conclusive presumption that a person under interrogation is unaware of his rights to counsel and to remain silent unless he has been advised of them by the police.

In *Williams v. North Carolina*, 317 U.S. 287, 292 (1942) and *Stromberg v. California*, 283 U.S. 359, 368 (1931), the juries were instructed that convictions could be predicated on the finding of any one of several alternative sets of facts. In each case, one set of facts did not amount to a crime of which petitioners could constitutionally be convicted. The convictions were reversed, even though there was in each case evidence from which the jury could find facts on which a valid conviction could be based, since it could not be said that the jury actually found such facts. The giving of these instructions could thus not be deemed harmless error under any standard.

*Bruno v. United States*, 308 U.S. 287 (1939), is merely a construction of the federal harmless error rule in its application to a nonconstitutional error made in a federal trial.

*United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 228 (1940) and *National Labor Relations Bd. v. Newport News Co.*, 308 U.S. 241, 248-49 (1939), have nothing to do with procedural rules. They deal with substantive law and merely hold that the Sherman Act and the National Labor Relations Act, respectively, are to be read literally.



that illegally seized evidence is "tantamount to coerced testimony," citing *Mapp v. Ohio*, 367 U.S. 643, 656 (1961), and he states that no rational basis exists for distinguishing unconstitutionally obtained real evidence from unconstitutionally obtained testimonial evidence, citing *Wong Sun v. United States*, 371 U.S. 471, 485-486 (1963). (Brief for the Petitioner 24-25).

These latter assertions raise very interesting questions upon which some constitutional questions may turn, but they have nothing to do with this case. The difference is not between illegally seized evidence and coerced testimony or real evidence and testimonial evidence, but between a confession, which is what it says it is, that is, an acknowledgment and admission of guilt, normally including an admission of all elements of the offense, and real or physical evidence which may or may not be prejudicial and constitute grounds for reversal. But the question turns not on the type of evidence or on the reason for its inadmissibility, but on the effect of the evidence, in light of the whole record, upon the trier of fact. The piece of grocery sack paper with which we are concerned in this case is no more like a confession than a cry of "help" is like a confession. Thus the rule requiring reversal in the case of an involuntary confession does not preordain the rule in cases involving an inadmissible utterance of an exculpatory or essentially meaningless character. Indeed the California Supreme Court has recognized this distinction, and while it reverses in the event of a confession, it has affirmed convictions where the inadmissible utterance was an

exculpatory statement or otherwise not prejudicial. See, e.g., *People v. Hillery*, 62 Cal.2d 692, 401 P.2d 382 (1965); *People v. Robinson*, 62 Cal.2d 889, 402 P.2d 834 (1965); *People v. Nye*, 63 Cal.2d 166, 403 P.2d 736, cert. denied, 384 U.S. 1026 (1966).

- e. The rule of reversal in cases where the denial of constitutional rights has resulted in denial of a fair trial does not require an absolute rule of reversal, since the use of illegally obtained evidence does not deny the defendant a fair trial.

In addition to the coerced confession cases, there have been numerous instances in which this Court has reversed a conviction by reason of the denial of various constitutional rights. The bulk of the cases relied on by the petitioner in this connection have one quality in common which gives to those cases a distinctive character. The common quality is that the error impaired the reliability of the guilt determining process. In essence, the defendant was denied a fair trial.

This is true of the denial of counsel at trial or of the denial of right to counsel at a critical stage in the proceedings. *Hamilton v. Alabama*, 368 U.S. 52 (1961); *White v. Maryland*, 373 U.S. 59 (1963). Trial by a judge, sitting as trier of fact, who has a pecuniary interest in finding an accused guilty, strikes at the very heart of the guilt-determining process. *Tumey v. Ohio*, 273 U.S. 510, 535 (1927). Where the community in which a trial is held has been saturated by prejudicial pretrial publicity concerning an accused's confession, there is no way to be sure that the jury which convicts the accused is uninfluenced by "evidence" not properly before it. *Rideau v. Louisiana*,

373 U.S. 723 (1963). An instruction in terms of a presumption violative of the Constitution because it does not logically arise from a given set of facts renders impossible a reliable determination of guilt. *Bollenbach v. United States*, 326 U.S. 607 (1946).<sup>3</sup> And, of course, there can be no greater threat to the reliability of the guilt determining process than the use of perjured testimony, as condemned by Judge Magruder in his concurring opinion in *Coggins v. O'Brien*, 188 F.2d 130, 139 (1st Cir. 1951). See also *Napue v. Illinois*, 360 U.S. 264 (1959).

But not all constitutional errors result in the denial of a fair trial. The distinction between the search and seizure exclusionary rule and those procedural defects which undermine the integrity of the fact-finding process has been specifically recognized by this Court in connection with the question of retrospective application, and we submit that the same principles may properly be considered in connection with the question of the application of the harmless error rule.

In *Linkletter v. Walker*, 381 U.S. 618 (1965), the Court specifically noted that one quality was common in regard to cases in which the court had applied a newly developed constitutional rule retrospectively:

"Finally, in each of the three areas in which we have applied our rule retrospectively the principle that we applied went to the fairness of the

<sup>3</sup>The implication in *Bollenbach* that the giving of an unconstitutional instruction necessarily requires reversal is dictum, since it is clear from the facts of the case that the jury based its verdict on the instruction in question.

trial—the very integrity of the fact-finding process.” *Id.* at 639 (footnote omitted).

Here, the Court pointed to *Griffin v. Illinois*, 351 U.S. 12 (1956), where the refusal to furnish transcripts of trial to indigents on appeal because of inability to pay—in effect, denying the appeal—was analogized to denying the poor a fair trial. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the judgment of guilt, where the defendant had been denied counsel, lacked reliability. In *Jackson v. Denno*, 378 U.S. 368 (1964), the defendant had in essence been denied a fair trial because he was never assured a fair determination of the voluntariness of his confession. *Linkletter v. Walker*, *supra* at 639 n. 30.

The Court drew a sharp contrast between such cases and a case involving the use of illegally obtained evidence:

“Here, as we have pointed out, the fairness of the trial is not under attack. All that petitioner attacks is the admissibility of evidence; the reliability and relevancy of which is not questioned, and which may well have had no effect on the outcome.” *Id.* at 639.

Earlier in the opinion, the Court had noted the “complex of values” which underlies the exclusion of coerced confessions from evidence—“the likelihood that the confession is untrue;” “the preservation of the individual’s freedom of will;” and “‘[t]he abhorrence of society to the use of involuntary confessions.’” 381 U.S. at 638, quoting from *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960). The Court then



drew a convincing distinction between the use of coerced confessions and the use of evidence which may have been illegally obtained:

"But there is no likelihood of unreliability or coercion present in a search-and-seizure case."  
381 U.S. at 638.

There is no doubt that when a defendant has been denied a fair trial, the judgment of conviction should be reversed. California does not dispute this. But we do dispute the proposition that every "constitutional error" results in the denial of a fair trial. The use of evidence which may have been illegally obtained does not deny a fair trial for the purposes of retroactive application. We submit that since there has been no denial of a fair trial and no impairment of the integrity of the fact-finding process, then it is not mandatory that any prejudicial error per se rule be applied.

A factor which seems to form at least part of the basis for requiring reversals in coerced confession cases, and which seems inevitable in cases where the error results in the denial of a fair trial, is the factor that some error is not susceptible of a reasonable degree of measurement in its impact on the trier of fact.

Where there has been a denial or abridgement of the right to counsel, as in *Hamilton v. Alabama*, 368 U.S. 52 (1961); *White v. Maryland*, 373 U.S. 59, 60 (1963); and *Glasser v. United States*, 315 U.S. 60 (1942), there is ordinarily no way to determine the degree to which an accused has been prejudiced by

denial of the right. There is thus no basis for holding that error in denying the right was harmless. Consequently, reversal follows as a matter of course. The same is true of denial of the right to an impartial judge, *Tumey v. Ohio*, 273 U.S. 510 (1927), or trial before a jury which has been exposed to prejudicial publicity. *Rideau v. Louisiana*, 373 U.S. 723 (1963).

But the amount of prejudice resulting from admission of illegally seized evidence is normally measurable. Where, as here, the record affords a reviewing court the opportunity to evaluate the illegally seized evidence in the light of its probative value and the remainder of the evidence adduced, it is often possible to come to the sound conclusion that the evidence complained of "had no effect on the outcome." *Linkletter v. Walker*, 381 U.S. 618, 639 (1965).

In *Fahy v. Connecticut*, *supra*, and *Stoner v. California*, *supra*, this Court found no difficulty in measuring the prejudice arising from the inadmissible evidence and considering its effect on other evidence introduced at the trial, its effect on the defendant and his admissions, and its effect on his testimony.

California recognizes that some errors involve a degree of prejudice which is not measurable and thus require a reversal in nearly all cases. The truth of the proposition that there may be error of this nature certainly does not support the doctrine that the harmless error rule must be discarded completely.

Finally, petitioner relies on some decisions which have required a reversal where the defendant has,

in a federal prosecution, been deprived of a specific procedural right guaranteed by the federal Constitution itself. To have a trial of a defendant in a federal court by 11 jurors without his consent requires a reversal. *Patton v. United States*, 281 U.S. 276, 292 (1930) (dictum). The attempt to put a defendant on trial in a federal court without a grand jury indictment as required by the Constitution calls for reversal. *Smith v. United States*, 360 U.S. 1, 9 (1959). Much the same reasoning has been applied in California to California convictions where the defendant has been denied a procedural right guaranteed by the California Constitution or even by California statutes. *People v. Elliott*, 54 Cal.2d 498, 354 P.2d 225 (1960). Unless the denial of a constitutional right was of such a nature that it denied the defendant a fair trial through impairing the integrity of the fact-finding process as categorized in *Linkletter v. Walker*, *supra*, we would expect that the state courts would be free under the United States Constitution to apply the harmless error rule or not, as they might see fit.

**2. The Nearly Unanimous View of State and Federal Appellate Courts Is That the Harmless Error Rule May Be Applied to Illegal Search and Seizure Cases.**

Since 1914, when the exclusionary rule in regard to evidence arising from unreasonable searches and seizures was applied to federal trials in *Weeks v. United States*, 232 U.S. 383 (1914), and since 1961, when the exclusionary rule was made applicable to state trials in *Mapp v. Ohio*, 367 U.S. 643 (1961),

there have been many cases tried in which objections were made to the admissibility of evidence on the ground that it was the product of an unreasonable search and seizure. In the vast majority of cases such evidence has been excluded on timely objection, but inevitably in a few cases the trial judge has erroneously admitted it in evidence. Sometimes this has been due to an inadequate understanding of the rules, but probably more commonly due to changes in the standards governing searches and seizures between the time of trial and the time the case is heard on appeal.

For example, in the case at bar, the search of Cooper's car a week or so after his arrest, the car being in the custody of the state pending proceedings to forfeit the vehicle, was lawful under California case law. The decisions in *Preston v. United States*, 376 U.S. 364 (1964) and *People v. Burke*, 61 Cal.2d 575 (1964), which intervened between the trial and the appeal, made the search unreasonable in the view of the state appellate court. The state appellate court in fact relied on the change in law in permitting Cooper to raise the question of illegal search and seizure on appeal.

"We observe that the case at bench was tried in April 1962 and therefore before the decision of *People v. Burke*, supra, 61 Cal. 2d 575 on July 30, 1964. Applying the rationale of *Kitchens*, we conclude that the general rule of appellate review should not be made applicable here since defendant could not have anticipated the change in the law in respect to searches of impounded automob-



biles in the lawful custody of the authorities and since we think any objection he would have made would have been futile in view of the prior decisions of appellate courts (see fn. 5 *ante*) holding in effect that legal custody of the car imparted legal possession of the contents." (R. 269).

Whether the reason is a change in the law or simply a mistake on the part of the trial judge and the prosecutor, the state and federal appellate courts are sometimes faced with cases where illegally obtained evidence has been received in evidence.

Petitioner argues that in such a case the appellate court must reverse the judgment without further ado. It must reverse the judgment without examining the record to determine whether the evidence in question in fact prejudiced the defendant. It must reverse the judgment even though the appellate court might conclude that the evidence did not prejudice the defendant and even though the judgment would be affirmed, if the evidence were inadmissible for some other reason, for example, lack of an adequate foundation or lack of a showing of a continuous chain of possession. Neither the state nor federal appellate courts by and large have accepted this startling proposition.

Probably the best discussion of this question appears in the opinion of the California Supreme Court authored by Chief Justice (then Justice) Traynor in *People v. Parham*, *supra*.

Parham had been convicted of three robberies in which the robber had used a pink piece of paper or

a check to demand money. Petitioner characterizes the case as involving the use of the "bloody fragments of a check that the police had brutally clubbed and choked out of the defendant . . . ." (Brief for the Petitioner 22). A reading of the opinion discloses that the defendant had been questioned in a parking area on a Friday where a stolen car used in the commission of one of the bank robberies had been abandoned on the previous Friday. The explanation that the defendant gave for being there was unlikely. When the officer asked for identification, the defendant took a money clip from his pocket, and the officer saw in the money clip a red or maroon bank passbook and a folded pink piece of paper that appeared to be a check. The officer examined a temporary driver's license produced by Parham and connected the description on the license with a Berkeley police bulletin giving an account of one of the bank robberies and containing a description and composite sketch of the robber.

The defendant told the officer that he had additional information in his car parked up the street and he voluntarily rode with the officer to the car. The defendant got in his car and while the officer stood outside the open door, the defendant took out his money clip, removed the pink paper and put the pink paper in his pocket. The officer asked him what the paper was and the defendant said that it was a check. The officer asked to see the check. The defendant withdrew it from his pocket, put it in his mouth and rolled over face down on the seat of the car, appar-

ently attempting to consume the paper. The officer got into the car and wrestled with the defendant in an attempt to extricate the check. At this point, another officer arrived and leaned through the window of the car and with the fingers of both hands began to press on defendant's cheeks, apparently to prevent the defendant from swallowing the paper. The newly arrived officer struck defendant twice on the back of the neck with a police club. Defendant then spit out the bloody fragments of the check.

While it does not appear that there was any choking involved, as suggested by petitioner, the California Supreme Court held nevertheless that clubbing a man to obtain evidence was brutal, offensive and a denial of due process. The court held that the check should not have been admitted into evidence.

However, the court did not stop at this point. After examining the entire record, the court concluded that the result would have been the same even had the check been excluded from evidence. While the check was relevant, it was merely cumulative of other undisputed evidence in the record. The possession of a pink check could be established by the officer's testimony as to what he heard and saw before any illegal conduct occurred and by the defendant's own testimony at the trial. Moreover, the other evidence of guilt was overwhelming.

The Court then dealt directly with the question of whether the harmless error rule could be applied to the case. After noting that the coerced confession

cases were in a class by themselves, Chief Justice Traynor delivered the following perceptive and persuasive analysis:

"Unlike involuntary confessions, other illegally obtained evidence may be, as in this case, only a relatively insignificant part of the total evidence and have no effect on the outcome of the trial. To require automatic reversal because of its admission is to lose sight of the basic purpose of the exclusionary rule to deter unconstitutional methods of law enforcement. (*Elkins v. United States*, 364 U.S. 206, 217 [80 S.Ct. 1437, 1453, 4 L.Ed.2d 1688, 1669]; *Mapp v. Ohio*, 367 U.S. 643, 656 [81 S.Ct. 1684, 6 L.Ed.2d 1081, 1090-1091]; *People v. Cahan*, 44 Cal.2d 434, 443, 445 [282 P.2d 905, 50 A.L.R.2d 513].) Unless we were to take the unprecedented step of holding that the state must be penalized for violating a defendant's constitutional rights in securing evidence by conferring an immunity upon him (see *People v. Valenti*, 49 Cal.2d 199, 203 [316 P.2d 633]), we must consider the deterrent effect of the exclusionary rule not as a penalty but as derived from the principle that the state must not profit from its own wrong. (*Walder v. United States*, 347 U.S. 62, 64-65 [74 S.Ct. 354, 98 L.Ed. 503, 506-507]; *McDonald v. United States*, 335 U.S. 451, 456 [69 S.Ct. 191, 93 L.Ed. 153, 158-159]; *People v. Martin*, 45 Cal.2d 755, 760 [290 P.2d 855].) The state does not so profit when erroneously admitted evidence does not affect the result of the trial. A reversal for the admission of illegally obtained evidence without regard for prejudice when there is compelling legally obtained evidence of guilt constitutes nothing more



than a penalty, not for the officer's illegal conduct in securing the evidence, but solely for the prosecutor's blunder in offering it and the trial court's error in admitting it. To require automatic reversal for such harmless error could not help but generate pressure to find that the unreasonable police conduct was lawful after all and thereby to undermine constitutional standards of police conduct to avoid needless retrial. (See *People v. Mickelson*, 59 Cal.2d 448, 452 [30 Cal.Rptr. 18, 380 P.2d 658]; *People v. Ditson*, 57 Cal.2d 415, 439-440 [20 Cal.Rptr. 165, 369 P.2d 714].) An exclusionary rule so rigidly administered could thereby defeat itself. We conclude that since there is no reasonable probability that the admission of the check in evidence affected the result, the judgment must be affirmed." *People v. Parham*, 60 Cal.2d 378, 385, 384 P.2d 1001, 1005 (1963), *cert. denied*, 377 U.S. 945 (1964).

In addition to California, every state court which has considered the question has held that its rule of harmless error may be applied to errors involving the admission of illegally seized evidence. *E.g.*, *State v. Fahy*, 149 Conn. 577, 183 A.2d 256 (1962), *rev'd*, 375 U.S. 85 (1963); *Casso v. State*, 182 So. 2d 252 (Fla. App. 1966); *Dampier v. State*, 180 So. 2d 183 (Fla. App. 1965); *Whippler v. State*, 218 Ga. 198, 126 S.E. 2d 744 (1962), *cert. denied*, 375 U.S. 960 (1963); *Shelly v. State*, 108 Ga. App. 6, 132 S.E.2d 228 (1963); *Gross v. State*, 235 Md. 429, 201 A.2d 808 (1964); *Commonwealth v. Kiernan*, 348 Mass. 29, 201 N.E.2d 504 (1964), *cert. denied*, 380 U.S. 913 (1965);

*State v. Sorenson*, 270 Minn. 186, 134 N.W.2d 115 (1965); *Dean v. Fogliani*, 407 P.2d 580 (Nev. 1965); *State v. Doyle*, 77 N.J.Super. 328, 186 A.2d 499 (1962), *remanded*, 40 N.J. 320, 191 A.2d 478 (1963), *aff'd*, 42 N.J. 334, 200 A.2d 606 (1964); *People v. Savino*, 20 App. Div. 2d 901, 248 N.Y.S.2d 984 (1964); *State v. Thomas*, 400 P.2d 549 (Ore. 1965); *McCain v. State*, 363 S.W.2d 257 (Tex. Crim. App. 1963); *State v. Stevens*, 41 Wash.2d 694, 251 P.2d 163 (1953); *Pulaski v. State*, 24 Wis.2d 450, 129 N.W.2d 204 (1964); *Hemmis v. State*, 24 Wis. 2d 346, 129 N.W.2d 209 (1964). Research has disclosed no state case holding to the contrary.

In addition, the vast majority of the cases in the United States Circuit Courts of Appeal which have passed upon the question have taken the same position. The following cases apply the doctrine of harmless error, either by holding or alternative holding, to errors in the admission of illegally seized evidence: *Hernandez v. United States*, 353 F.2d 624 (9th Cir. 1965); *Westover v. United States*, 342 F.2d 684 (9th Cir. 1965), *rev'd on other grounds*, 384 U.S. 436 (1966); *McDonald v. United States*, 307 F.2d 272 (10th Cir. 1962); *United States v. McCall*, 291 F.2d 859 (2nd Cir. 1961); *Woods v. United States*, 240 F.2d 37 (D.C. Cir.), *cert. denied*, 353 U.S. 941 (1957); *United States v. Perez*, 242 F.2d 867 (2nd Cir.), *cert. denied*, 354 U.S. 941 (1957); *United States v. H.J.K. Theatre Corp.*, 236 F.2d 502 (2nd Cir. 1956), *cert. denied*, 352 U.S. 969 (1957); *Dorsey v. United States*, 174 F.2d 899 (5th Cir. 1949), *cert. denied*, 338 U.S.

950 (1950); *Rogers v. United States*, 128 F.2d 973 (5th Cir. 1942.)<sup>4</sup>

The above cases show that of the courts which have passed upon the question, all of the state courts plus the Second, Fifth, Ninth, and Tenth Circuits have held their harmless error rules applicable to illegally seized evidence cases. Only the District of Columbia and Eighth Circuits have taken a contrary position, and even they have not done so unequivocally.<sup>5</sup> While

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<sup>4</sup>*Woods, Perez, H.J.K. Theatre Corp., Dorsey, and Rogers* were all decided prior to *Mapp v. Ohio*, 367 U.S. 643 (1961). Since petitioner implies that the exclusionary rule was not "recognized as a constitutional mandate" prior to *Mapp* (Brief for the Petitioner 31), he may seek to distinguish these cases on the theory that the errors there held harmless were not thought to be constitutional errors. *Mapp* itself, however, refutes this.

"At the time that the Court held in *Wolf* that the Amendment was applicable to the States through the Due Process Clause, the cases of this Court, as we have seen, had steadfastly held that as to federal officers the Fourth Amendment included the exclusion of the evidence seized in violation of its provisions. Even *Wolf* 'stoutly adhered' to that proposition." *Mapp v. Ohio*, *supra*, at 655.

It follows, therefore, that the pre-*Mapp* as much as the post-*Mapp* federal cases are authority for the proposition that the harmless error rule can be applied to errors involving constitutional rights.

<sup>5</sup>The only cases which have held that the harmless error rule may not be applied to save convictions where illegally seized evidence has been introduced at trial are *Williams v. United States*, 263 F.2d 487 (D.C. Cir. 1959) and *Honig v. United States*, 208 F.2d 916 (8th Cir. 1953). But in neither case is it possible to say that these holdings clearly state the law of the circuits in which they were decided. The court's treatment of the subject in *Williams* is very sketchy and may possibly be dictum, in view of the fact that the court does not make clear whether admission of the illegally seized evidence could actually have prejudiced the appellant. Moreover, *Woods v. United States*, 240 F.2d 37 (D.C. Cir.), *cert. denied*, 353 U.S. 941 (1957), decided in the same circuit two years earlier, had clearly applied the harmless error rule. The *Williams* court's failure even to cite *Woods*, much less overrule it,

the decisions of state and lower federal courts do not, of course, control this Court in its constitutional adjudications, they do represent the overwhelming weight of authority and should not be lightly dismissed.

The proposition that a harmless error rule may be applied in illegally seized evidence cases also has the support of sound scholarly opinion. See 64 Colum. L. Rev. 367 (1964); 1963 U. Ill. L.F. 714; 25 U. Pitt. L. Rev. 601 (1964).

3. To Apply a Reversible Per Se Rule to Cases Involving the Admission of Illegally Obtained Evidence Would Require That This Court Hold the Harmless Error Rule as Enacted by Congress and All the States Unconstitutional at Least in Part.

In urging the Court to reject its own prior decisions and the nearly unanimous view of the state and federal appellate courts, petitioner seeks to establish a reversible error per se rule for illegally obtained evidence and even for the vague concept of "constitutional error."

The reversible per se or presumption of prejudice rule which persisted in the second half of the

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leaves the position of the District of Columbia Circuit somewhat in doubt. Two years after the decision in *Honig*, the Eighth Circuit decided *Hobson v. United States*, 226 F.2d 890 (8th Cir. 1955), in which reversal was based on the fact that the trial court's opinion made it clear that the conviction was based on the consideration of illegally seized evidence. If the court had desired to approve *Honig*, it would have based reversal on the non-applicability of the harmless error doctrine, rather than on the proposition that the error was not in fact harmless. The *Hobson* case, therefore, casts some doubt on the present validity of *Honig*.



Nineteenth Century was a painful chapter in the history of criminal jurisprudence. Historical reiteration is unnecessary as this Court is well aware of the nation-wide movement which overcame the per se rule and the corresponding emergence of the harmless error concept. *Kotteakos v. United States*, 328 U.S. 750, 758-766 (1946). After a lengthy reign, the reversible per se rule was found to be totally unsatisfactory and finally was vehemently and overwhelmingly rejected in the early 1900's.

The fundamental fault in the presumption of prejudice concept was the substitution of mechanical rules for the trusted judgment of appellate courts. Yet despite prior experience, petitioner would have this Court refabricate a presumption of prejudice for errors in the admission of evidence, which although unconstitutionally seized, is not inherently prejudicial. The resurrection of such a presumption would once again deprive appellate courts of their role in implementing the concepts of fairness and due process.

In order to recreate a per se rule for errors involving the admission of unconstitutionally seized evidence, this Court would have to declare unconstitutional, at least in part, the following:

1. An Act of Congress; 63 Stat. 105 (1949), 28 U.S.C. § 2111 (1964).<sup>9</sup>

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<sup>9</sup>The federal statute reads as follows:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

2. The statutes or rules of 37 states.<sup>7</sup>

- (1) *Alabama*: 5 Ala. Code tit. 15, § 389 (1958), and Ala. Sup. Ct. R. 45.
- (2) *Alaska*: Alaska R. Crim. P. 47(a).
- (3) *Arizona*: Ariz. R. Civ. P. 61, which is applied to criminal cases by Ariz. Sup. Ct. R. 15.
- (4) *Arkansas*: 4A Ark. Stat. § 43-2725 (1964).
- (5) *California*.
- (6) *Colorado*: Colo. R. Crim. P. 52(a).
- (7) *Connecticut*: IX Conn. Gen. Stat. § 52-265 (1958), which is applied to criminal cases, see *State v. Fahy*, 149 Conn. 577, 588, 183 A.2d 256, 262 (1962), *rev'd on other grounds*, 375 U.S. 85 (1963).
- (8) *Delaware*: Del. Super. Ct. R. Crim. 52(a).
- (9) *Florida*: 1 Fla. Stat. § 54.23 (1965), and 2 Fla. Stat. § 924.33 (1965).
- (10) *Idaho*: 4 Idaho Code §§ 19-2819, 19-3702 (1947).
- (11) *Illinois*: Ill. Ann. Stat. ch. 38, § 121-9 (1964).
- (12) *Indiana*: 4(1) Ind. Stat. Ann. § 9-2320 (1956).
- (13) *Iowa*: 57 Iowa Code Ann. § 793.18 (1946).
- (14) *Kansas*: 4 Kan. Stat. Ann. § 62-1718 (1963).
- (15) *Kentucky*: Ky. Crim. Code §§ 340, 353 (1880).
- (16) *Louisiana*: 12 La. Rev. Stat. § 15:557 (1950), and La. Code Crim. P. § 921 (1966) (effective Jan. 1, 1967).
- (17) *Maryland*: 1 Md. Code Ann. art. 5, § 16 (1957), or *Moxley v. State*, 205 Md. 507, 517, 109 A.2d 370, 374 (1954) (indicating application of judicial "harmless error" rule if article 5, section 16, is insufficient to do so).
- (18) *Michigan*: Mich. Gen. Ct. R. 529.1.
- (19) *Missouri*: Mo. R. Civ. P. 83.13(b), as applied to criminal appeals by Mo. R. Crim. P. 28.18.
- (20) *Montana*: 8 Mont. Rev. Codes § 94-8207 (1947), which applies to erroneous admission of evidence, see *State v. Bubnash*, 142 Mont. 377, 393-94, 382 P.2d 830, 838 (1963).
- (21) *Nebraska*: 2A Neb. Rev. Stat. § 29-2308 (1956).
- (22) *Nevada*: 2 Nev. Rev. Stat. §§ 169.110, 177.230 (1911).
- (23) *New Jersey*: N.J. Sup. Ct. R. 1:5-1(a).
- (24) *New Mexico*: 6 N.M. Stat. § 41-14-12 (1953), incorporating 4 N.M. Stat. § 21-2-1, (17.10) at 493, (61) (1953).
- (25) *New York*: N.Y. Code Crim. P. § 542 (1958), which applies to erroneous admission of evidence, see *People v. Silverman*, 181 N.Y. 235, 73 N.E. 980 (1905).
- (26) *North Dakota*: 5 N.D. Cent. Code § 29-28-26 (1960), which applies to erroneous admission of evidence, see *State v. Pusch*, 77 N.D. 860, 898, 46 N.W.2d 508, 527 (1950).

### 3. The carefully considered judicial positions of 13 additional states.<sup>8</sup>

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- (27) *Ohio*: Ohio Rev. Code § 2945.83 (1953), which applies to criminal cases, see *State v. Alexander*, 55 Ohio L. Abs. 55, 57, 130 N.E.2d 378, 379 (2d Dist. Ct. App. 1954); see also Ohio Rev. Code Ann. tit. 59, § 5924.59(A) (Supp. 1966) (Code of Military Justice).
  - (28) *Oklahoma*: 1 Okla. Stat. tit. 22, § 1068 (1961).
  - (29) *Oregon*: Ore. Const. art. VII, § 3, which applies to errors in admission of evidence, see *State v. Quartier*, 114 Ore. 657, 674, 236 Pac. 746, 751 (1925); 1 Ore. Rev. Stat. § 138.230 (1959), which applies to errors in admission of evidence, see *State v. Story*, 208 Ore. 441, 446, 301 P.2d 1043, 1045 (1956).
  - (30) *South Dakota*: 2 S.D. Code § 34.2902 (Supp. 1960), or see *State v. Reddington*, 80 S.D. 390, 397, 125 N.W.2d 58, 62 (1963). (suggesting existence of pre-statutory judicial "harmless error" rule), and cf. *State v. Butler*, 71 S.D. 455, 459, 25 N.W.2d 648, 650 (1946) (suggesting applicability of "harmless error" rule to questions of evidence).
  - (31) *Tennessee*: 5 Tenn. Code Ann. §§ 27-116, 27-117 (1956), and Tenn. Sup. Ct. R. 14(6).
  - (32) *Utah*: 8 Utah Code Ann. § 77-42-1 (1953), which applies to errors in admission of evidence, see *State v. Sibert*, 6 Utah 2d 198, 204, 310 P.2d 388, 392 (1957).
  - (33) *Vermont*: Vt. Sup. Ct. R. 9.
  - (34) *Virginia*: 2 Va. Code § 8-487(8). (1957), which applies to errors in admission of evidence, see *Simmons v. Boyd*, 199 Va. 806, 812-13, 102 S.E.2d 292, 296-97 (1958), and to criminal cases, see *Elliott v. Commonwealth*, 172 Va. 595, 601, 1 S.E.2d 273, 276 (1939).
  - (35) *Washington*: Wash. Rev. Code Ann. tit. 4, § 4.36.240 (1950) (civil procedure), which has been applied to criminal cases, see *State v. Slater*, 36 Wash. 2d 357, 361, 218 P.2d 329, 331 (1950) (citing what is now section 4.36.240).
  - (36) *Wisconsin*: Wis. Stat. Ann. § 274.37 (1958).
  - (37) *Wyoming*: Wyo. R. Civ. P. 1, which applies Wyo. R. Civ. P. 72(g) to criminal appeals.
- <sup>8</sup>(1) *Georgia*: *Humphreys v. State*, 45 Ga. 190 (1872); *Dukes v. State*, 109 Ga. App. 825, 829, 137 S.E.2d 532, 535 (1964); *Miller v. State*, 94 Ga. App. 259, 264, 94 S.E.2d 120, 123 (1956).
- (2) *Hawaii*: *State v. Hashimoto*, 46 Hawaii 183, 377 P.2d 728 (1962).

#### 4. The statutes of 3 territories.\*

In addition, it should be noted that both Great Britain and Canada have similar statutes which are respectively considered indispensable to the effective administration of justice.<sup>10</sup> The Anglo-American ju-

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- (3) *Maine: State v. Smith*, 140 Me. 255, 275, 37 A.2d 246, 255 (1944); *State v. Cloutier*, 134 Me. 269, 278, 186 Atl. 604, 609 (1936); *State v. Priest*, 117 Me. 223, 231, 103 Atl. 359, 363 (1918).
  - (4) *Massachusetts: Commonwealth v. Smith*, 342 Mass. 180, 188, 172 N.E.2d 597, 603 (1961).
  - (5) *Minnesota: State v. Mitchell*, 268 Minn. 513, 521, 130 N.W. 2d 128, 133 (1964), cert. denied, 380 U.S. 984 (1965); *State v. Keaton*, 258 Minn. 359, 366, 104 N.W.2d 650, 656 (1960).
  - (6) *Mississippi: Coggins v. State*, 222 Miss. 49, 63, 75 So.2d 258, 265 (1954).
  - (7) *New Hampshire: State v. Amero*, 106 N.H. 134, 137, 207 A.2d 440, 442 (1965).
  - (8) *North Carolina: State v. Rowland*, 263 N.C. 353, 360-61, 139 S.E.2d 661, 666 (1965); *State v. Woolard*, 260 N.C. 133, 138, 132 S.E.2d 364, 368 (1963).
  - (9) *Pennsylvania: Commonwealth v. Barnak*, 357 Pa. 391, 419, 54 A.2d 865, 878 (1947); *Commonwealth v. Savor*, 180 Pa. Super. 469, 573-74, 119 A.2d 849, 851 (1956), *aff'd*, 386 Pa. 523, 126 A.2d 444 (1956), cert. denied, 353 U.S. 958 (1957).
  - (10) *Rhode Island: State v. Brown*, 191 A.2d 353, 354 (1963); see also 5 R.I. Gen. Laws § 30-13-69(a) (Supp. 1965) (Code of Military Justice).
  - (11) *South Carolina: State v. Smith*, 245 S.C. 59, 63, 138 S.E. 2d 705, 706 (1964); *State v. Harriott*, 210 S.C. 290, 298, 42 S.E.2d 385, 388 (1947).
  - (12) *Texas: Perdue v. State*, 171 Tex. Crim. 332, 333, 350 S.W. 2d 203, 204 (1961); *Girvin v. State*, 112 Tex. Crim. 355, 358, 15 S.W.2d 643, 645 (1929).
  - (13) *West Virginia: State v. Lewis*, 133 W. Va. 584, 599, 57 S.E.2d 513, 524 (1950); *State v. Bragg*, 105 W. Va. 36, 38, 141 S.E. 400, 401 (1928).
- \* (1) *Canal Zone*: 2 C.Z. Code tit. 6, § 3501(a) (1963), which adopts the Federal Rules.  
 (2) *Guam*: Guam R. Crim. P. 25(a).  
 (3) *Puerto Rico*: 10 P.R. Laws Ann. tit. 34, §§ 1171-72 (1956).  
<sup>10</sup> Criminal Appeal Act, 1907, 7 Edw. 7, c. 23; Can. Rev. Stat. c. 51, § 592 (1954).



risdictions are thus united in their adoption of the harmless error concept and a corresponding rejection of the antiquated presumption of prejudice doctrine.

In comparison, three recent landmark decisions of this Court have recognized that the prevailing trend among the states was toward the position adopted.

In *Mapp v. Ohio*, 367 U.S. 643 (1961), this Court noted that "while in 1949, prior to the *Wolf* case, almost two-thirds of the states were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule. See *Elkins v. United States*, 364 U.S. 206, Appx. pp. 224-232." *Id.* at 651. The Court also made special mention of the fact that California was a leader in this trend toward adoption of an exclusionary rule, citing *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905 (1955). *Ibid.*

In *Gideon v. Wainwright*, 372 U.S. 335 (1963), this Court again recognized the prevailing nationwide sentiment. It found that only three states had voiced an opinion in favor of *Betts v. Brady*, 316 U.S. 455 (1942), while twenty-two other states, as friends of the Court, believed that the *Betts* case "was 'an anachronism when handed down' and that it should now be overruled." *Id.* at 345.

In regard to the comment rule this Court found that "the overwhelming consensus of the states . . . is opposed to allowing comment on the defendant's

failure to testify. The legislatures or courts of 44 states have recognized that such comment is, in light of the privilege against self incrimination, 'an unwarrantable line of argument.' [Citation.]” *Griffin v. California*, 380 U.S. 609, 611, n. 3 (1965).

In sharp contrast to the trends recognized in the preceding cases, there is today a total absence of sentiment in favor of a return to the reversible per se rule regarding errors in admitting unconstitutionally seized evidence among those states which have experienced the harmless error concept. In addition to the initial surge to incorporate the harmless error concept in the early years of this century, there is a continuing trend toward the harmless error concept. More states are becoming convinced that the orderly administration of justice is not enhanced by adherence to the old reversible per se rule.

4. The Application by the State and Federal Appellate Courts of the Harmless Error Rule to the Admission of Illegally Obtained Evidence Would Not Impair the Deterrent Effect of the Exclusionary Rule.

Bereft of support in the decisions of this Court or the state and federal-appellate courts, petitioner falls back on the tired but perennial slogan that “lawless law enforcement” must be deterred. (Brief for the Petitioner 34). We do not dispute the proposition that lawless law enforcement must be deterred. The point is that the judicial repeal of the harmless error rule will not deter violations of the Fourth Amendment.

The harmless error rule does not bear directly or indirectly upon the protection of the Fourth Amendment to the United States Constitution. The constitutional standards governing searches and seizures are expressed in many opinions of this Court and of the state and federal appellate courts, and California has sought as best it could to comply with those standards and apply them to state proceedings. Whether or not the harmless error rule survives in search and seizure cases will not in any way expand or increase the protections of the Fourth Amendment. It is conceivable, as Chief Justice Traynor pointed out in *People v. Parham, supra*, that a rule requiring reversal without regard to the effect of the error might, consciously or subconsciously, induce appellate judges to limit the scope of the Fourth Amendment to prevent unnecessary and unwarranted reversals. It is inconceivable, however, that abolishing the harmless error rule could in any way expand upon the protection of the Fourth Amendment.

Take the case at bar as an example. The District Court of Appeal held that the search of a vehicle several days after the arrest without a search warrant was unreasonable and the product of that search inadmissible even though the car had been seized and was subject to forfeiture to the state. This ruling is binding upon law enforcement officers, prosecutors, trial courts and magistrates. In declaring the search unreasonable, the state appellate court was performing its historic office of interpreting and applying the Fourth Amendment and both declaring the rights of

the citizenry and the duty of law enforcement officers and lower courts. The publication of the opinion gives guidance to officers and lower court judges and prosecutors so that they can conform with constitutional requirements in the future. Incidentally, moral blame can scarcely be cast upon the officers, the prosecutor or the trial judge in the case at bar, since the state appellate court held that under the law as understood at the time of the search and the trial, the search was reasonable and the evidence obtained thereby admissible. It was only an intervening change in the law that made the evidence inadmissible. Curiously enough, had the case been taken by the federal government—and federal agents did participate in the investigation and the arrest—the evidence in question would have been admissible in the federal courts under the Fourth Amendment. See *Burge v. United States*, 342 F.2d 408 (9th Cir.), *cert. denied*, 382 U.S. 829 (1965). Nevertheless, the decision of the state appellate court would make it clear that a search of a vehicle under the circumstances here involved would be unreasonable, and the products of such search inadmissible in evidence.

But the state appellate court had another historic office to perform. And that was to dispose of Joe Cooper. In determining whether Cooper's conviction would be affirmed or reversed, the state appellate court had to abide by the California Constitution, as the Justices have sworn to do, and appraise the effect of the erroneously admitted evidence in light of the outcome of the trial. It did so, and determined that



a reversal was not warranted. But, in arriving at this conclusion, the Court is not concerned with the Fourth Amendment, with the duty of officers under that amendment, or with the rights of citizens under that amendment. It is concerned only with the effect of the evidence, regardless of the reason for its inadmissibility. The difference in these functions must be clearly recognized.

It is clear then that the harmless error rule, or to put it more accurately, the rule governing the disposition of cases on appellate review, is a rule of judicial administration which regulates the relations between appellate courts and trial courts. It is not a rule that measures the nature or extent of constitutional rights. It neither enhances nor limits constitutional rights.

Nevertheless, the petitioner argues that the harmless error rule does have an effect on the enforcement of the rules governing search and seizure in at least two ways.

First, he argues that the rule will tempt police to search unconstitutionally for and seize evidence to shore up weak cases, apparently relying on the harmless error rule to uphold the conviction. He suggests that prosecutors will be tempted to "button up" their cases by the use of illegally obtained evidence, hoping for the "saving grace" of the harmless error rule. Finally, he thinks that trial court judges will resolve differences of opinion against constitutional rights, again relying on that self-same "saving grace." Consequently, he argues that while an occasional convic-

tion upon a weak case will be reversed, many close cases will result in affirmed convictions and almost all strong cases will be allowed to stand. As a result there will be no effective remedy for unconstitutional searches and seizures. He invokes the spectacle of a possibly innocent man in a weak and close case, apparently being injured in some way by the application of the harmless error rule. At this point he refers to a lengthy Appendix attached to his brief which lists a considerable number of cases in which the harmless error rule has been applied in California in relation to constitutional errors. (Brief for the Petitioner 35.)

This argument conjures up a spectacle which, if true, might give pause to the Court. The trouble is that the argument is based upon both an unrealistic and naive view of the impact of exclusionary rules upon police activity and a failure to appreciate at all California criminal procedure and the remedies available to an accused defendant. Moreover, the Appendix adds apples and oranges as if they were the same and presents only a partial and a very misleading picture of the appellate situation in California.

Deterrence is mainly achieved by informing and training law enforcement officers so that they can comply with the requirements of the search and seizure rules. The education and training of law enforcement officers does not spring full blown from the minutes of the state appellate courts or this Court. A costly and demanding program is required,

and it is probably fair to say that we have only started upon an adequate program of this kind. Nevertheless, such programs are the only answer to insuring the protection of the constitutional rights of the individual and insuring that admissible evidence is secured so that guilty persons may be apprehended and removed from society.

We do not, of course, dispute the conclusion of this Court in *Mapp v. Ohio*, *supra*, preceded as it was a decade earlier by the California Supreme Court in *People v. Cahan*, *supra*, that the exclusionary rule is necessary in order to put teeth into the Fourth Amendment.

But the exclusionary rule in California is given effect in a variety of ways. Probably the most important effect, from the standpoint of the citizen, arises from the restraint shown by police officers when they feel, as a result of the educational and training programs earlier mentioned, that they cannot lawfully make a search under the circumstances and in light of the controlling principles of law. If the officer makes the search under questionable circumstances, the question of the reasonableness of the search and seizure will be reviewed by the district attorney in determining whether to issue a felony complaint or take the case to the grand jury, and there is no question that the products of many bad searches or borderline searches are excluded at that time. Thus, the impact of the exclusionary rule is frequently felt before the case ever reaches the court. Probably the impact is most significant upon a police officer

when his own superior refuses to take a case to the district attorney because he has doubts about the search or when the district attorney rejects the case on the ground that the search was unreasonable.

If the district attorney feels that he can proceed with the case, the defendant may object to the evidence at the preliminary examination and the magistrate will exclude the evidence if he is satisfied that there was an unreasonable search and seizure and the case goes no further. If the magistrate receives the evidence and the defendant is bound over to the Superior Court, he may move to set aside the information under section 995 of the Penal Code and in most cases raise the search and seizure question. If that motion is denied, he may apply to the District Court of Appeal under section 999a of the Penal Code for a writ of prohibition raising the question of illegal search and seizure. If the District Court of Appeal denies his petition, he may petition the California Supreme Court for a hearing. If he is unsuccessful in his pre-trial motions and in seeking appellate review, he may raise the question again during the trial by a timely objection to the evidence. If that objection is overruled and he is convicted, he may again raise the question on motion for new trial in the superior court. If that motion is denied, he may appeal from the judgment of conviction or order granting probation and raise the question in the appellate court.

We cannot believe that any police officer or prosecutor would rely on the "harmless error" rule and



anticipate that every magistrate and judge involved will rule erroneously and receive the evidence and that ultimately the judgment will be affirmed by the appellate justices on the ground of harmless error.

In any event, the prosecutor does not decide questions of admissibility; he can only offer evidence. Our experience does not indicate that the trial judges in California are the submissive dupes that petitioner seems to imagine them to be. If anything, the complaints we receive from district attorneys tend to indicate a reluctance to receive evidence which is questionable in any degree on the theory, which is a sound one from the trial judge's standpoint, that he cannot err in excluding prosecution evidence. He will never be reversed for sustaining an objection to the People's evidence.

We have to agree with Mr. Justice Harlan, that "... there is no danger that application of the [harmless error] rule will undermine the prophylactic function of the rule of inadmissibility." *Fahy v. Connecticut*, 375 U.S. at 94 (dissenting opinion).

Finally, it has been suggested, however, that deterrence of Fourth Amendment violations is not the sole purpose of the exclusionary rule. *Linkletter v. Walker*, 381 U.S. 618, 649 (1965) (dissenting opinion of Mr. Justice Black). If this is true, then another purpose must be the rectification of the denial of constitutional rights. Unreasonable searches and seizures constitute, in themselves, the primary violations of constitutional rights.

This Court has never had occasion to decide whether a separate violation of a constitutional right occurs when illegally seized evidence is used in a trial. The Fourteenth Amendment provides, in part, that: "No state shall . . . deprive any person of life, liberty, or property without due process of law." This language implies that there can be no denial of due process until a person has actually been deprived of life, liberty, or property. It follows that the mere use during a trial of unconstitutionally obtained evidence does not, in itself, violate due process, since a person against whom such evidence has been used may nonetheless be acquitted, and one who has been acquitted cannot be said to have been denied due process. The logical conclusion is that a denial of due process has occurred only when a conviction has been obtained through the use of illegally seized evidence.

The basic premise of the harmless error rule, as applied in illegally seized evidence cases, is that the evidence played no part in securing the conviction. This being true, how can it be said that the introduction at trial of unconstitutionally obtained evidence which in fact is harmless constitutes a separate denial of constitutional rights? Therefore, if one of the purposes of the exclusionary rule is to rectify the denial of a constitutional right, the right in question is the right to avoid being convicted through the use of unconstitutionally obtained evidence, and the harmless error rule is applied in order to hold that such evidence played no part in securing a conviction, then the harmless error rule does not prevent the fulfill-

ment of this purpose of the exclusionary rule. As this Court has observed, the exclusionary rule can never rectify the primary violation of the Fourth Amendment—the unreasonable search and seizure itself: “[T]he ruptured privacy of the victims’ homes and effects cannot be restored. Reparation comes too late.” *Linkletter v. Walker*, 381 U.S. 618, 637 (1965).

A word must be said about Appendix A attached to the brief for the petitioner. This appendix lists a number of California cases falling into three categories in which errors were found and yet convictions were affirmed on the basis of the harmless error rule. The appendix is relied on for the proposition that violations of constitutional rights are encouraged by the harmless error rule as purportedly demonstrated by the frequency with which the appellate courts in California have found it necessary to invoke that rule (Brief for the Petitioner 35).

Let us take a closer look at the appendix. The first page lists seven cases in which the harmless error rule was applied to cases where illegally obtained evidence had been received in the course of the trial. Only two of these cases are from the California Supreme Court. One is *People v. Parham*, *supra*, which we have discussed at length. The other is *In re Shipp*, 62 Cal.2d 547, 399 P.2d 571 (1965), which principally involved the question of collateral attack, and while there is some mention of the harmless error rule the basic holding is that California does not permit collateral attack because of unreasonable search and seizure at all. See *In re Sterling*, 63 Cal.2d 486, 407 P.2d 5

(1965). The remaining five cases are from the intermediate appellate courts and include among their number the case at bar. In order to put these five affirmances in context, we have examined all the decisions of the intermediate appellate courts since 1961 when *Mapp v. Ohio* was decided. We found 372 decisions. In 367 of those cases the decision turned on the merits of the search and seizure. If the search was good, the conviction was affirmed. If the search was bad, the conviction was reversed or a writ of prohibition granted depending on the procedural posture of the case. It is difficult to find in these numbers any frequency of decisions affirming convictions on the basis of the harmless error rule in the face of an illegal search and seizure—5 out of 372 published opinions—so that the violation of constitutional rights is encouraged to any degree whatever.

We will not comment upon the third category of cases since they involve affirmances despite a *Griffin* error and are intimately related to *Chapman v. California*, No. 95, now pending in this Court.

The second category of cases is of an entirely different order. They are purportedly listed as cases involving the "ADMISSION OF UNCONSTITUTIONALLY OBTAINED STATEMENTS IN VIOLATION OF *ESCOBEDO V. ILLINOIS*, 378 U.S. 478 (1964)." (Brief for the Petitioner 55).

These cases are not "*Escobedo*" cases at all as the binding import of that decision was limited in *Johnson v. New Jersey*, 384 U.S. 719 (1966). They are what we have referred to in California as "*Dorado*"



cases. To briefly recapitulate the history, the California Supreme Court in January of 1965 held that under the compulsion of *Escobedo* any statement of a defendant was inadmissible in evidence unless the record established that the defendant had been warned of his right to counsel and his right to remain silent, provided that the defendant was in custody at the time and that the investigation had focused upon him, and that he was subjected to a process of interrogations designed to elicit incriminating statements. *People v. Dorado*, 62 Cal.2d 338, 398 P.2d 361, cert. denied, 381 U.S. 937, 946 (1965).

The fact was that the cases which were then pending on appeal had been investigated and had been tried under the belief by law enforcement officers, prosecutors, and trial judges—and at that time a well-founded belief—that the giving of the warnings of right to counsel and right to remain silent were material factors in determining voluntariness but not essential conditions of admissibility. Consequently, it was unusual when the record would establish the giving of the requisite warnings. In applying the *Dorado* rule the California Supreme Court drew a distinction, not in regard to admissibility, but in regard to the application of the harmless error rule. Deeming itself bound by the coerced confession cases, the Court held that it would reverse whenever a confession had been received in evidence in violation of the *Dorado* rule. However, where the statement of the defendant constituted only a minor admission or an exculpatory statement, then the Court would consider the prejudice to the defendant arising from the use of

the statement and reverse or affirm, depending on whether the statement was prejudicial within the meaning of the harmless error rule. *People v. Hillery*, 62 Cal.2d 692, 401 P.2d 382 (1965). The result has been in part the line of cases cited in Appendix A in which judgments have been affirmed even though a statement was received which was in violation of the *Dorado* rule. Petitioner has not cited the longer list of cases in which judgments were reversed because the statement constituted a confession and not merely an exculpatory statement or a minor admission.

There are several interesting features about this line of cases. First of all, *Johnson v. New Jersey*, 384 U.S. 719 (1966), made it clear that even the reversals were not necessary in light of *Escobedo* unless there had been a request for counsel and the other specific conditions of that decision met. *A fortiori*, there was no need for the state appellate courts to determine in the cases listed in the Appendix that the reception into evidence of a statement was erroneous. As far as the United States Constitution is concerned, these were not errors at all. Secondly, while it is true that the California courts believed that these were federal constitutional errors, they also felt that reversal was not compelled in all cases unless the statement constituted a confession. The validity of this distinction is one that may some day be decided, although it is not essential to the decision here. If our analysis of the coerced confession cases is correct and the rule of reversal hinges on the effect of a confession, then it would seem reasonable to permit the application of the harmless error rule to utterances which are less

than a confession and which may or may not, depending on the circumstances, prejudice the defendant.

In any event, the *Dorado* cases, while constituting an interesting period in California legal history, scarcely warrant the charge that they constitute a "blueprint for evasion of *Miranda v. Arizona*" (Brief for the Petitioner, Appendix A).

The notion that this Court must strike down the harmless error rule as enacted by Congress and as enacted and applied by the states of the Union in order to prevent the California appellate judges from executing some kind of a conspiratorial and diabolical "blueprint for evasion of *Miranda v. Arizona*" must rank as one of the most startling and perplexing statements to be encountered in recent years. To any one familiar with the last decade of California judicial decisions, this suggestion is preposterous and insulting, not to us, but to the appellate judges who have ironically been the target for a good deal of criticism on the ground that they have been over-zealous in protecting constitutional rights.

Moreover, even from a national standpoint, the petitioner is on no stronger ground. His entire attack on the concept of harmless error is instinct with the notion that the states, and their appellate courts, cannot be trusted to protect federal constitutional rights. The facts refute this claim of infidelity to our Constitution.

Twenty-six state jurisdictions, by legislative act or judicial decree, applied an exclusionary rule to evidence illegally seized by state officers two years before

this was made mandatory in *Mapp v. Ohio*, 367 U.S. 643 (1961). *Elkins v. United States*, 364 U.S. 206, 224 (1960) (Appendix).

In *Gideon v. Wainwright*, 372 U.S. 335, 336, 345 (1963), twenty-two states, as *amicus curiae*, urged this Court to reverse *Betts v. Brady*, 316 U.S. 455 (1962).

Forty-four states prohibited the type of prosecutorial comment condemned in *Griffin v. California*, 380 U.S. 609, 611, n. 3 (1965). The remaining six states, this Court has emphasized, in approving a contrary practice acted "in the utmost good faith."

A few state courts anticipated, rightly or wrongly, this Court's extension of *Escobedo v. Illinois*, 378 U.S. 478 (1964) in *Miranda v. Arizona*, 384 U.S. 436 (1966). *People v. Dorado*, 62 Cal.2d 338, 398 P.2d 361, cert. denied 381 U.S. 937 (1965); *State v. Neely*, 239 Or. 487, 398 P.2d 482 (1965); *State v. Dufour*, 206 A.2d 82 (R.I. 1965). These states proceeded without knowing whether the newly recognized right was founded upon the Fifth Amendment or upon the Sixth Amendment. Amidst such confusion, the majority of states were reasonable in their disinclination to go beyond *Escobedo*. *Johnson v. New Jersey*, 384 U.S. 719 (1966) confirms the propriety of their reluctance.

There has been a state vanguard in the recognition of the constitutional rights of the criminal defendant. It has not been comprised of a certain coterie of progressive states. Every state, excepting New Jersey and New Mexico, has preceded this Court in its recognition of a constitutional right established by at least one of the following cases: *Mapp v. Ohio*; *Gideon*



*v. Wainwright; Escobedo v. Illinois; Griffin v. California.*<sup>11</sup>

5. This Court Should Not Assume That State and Federal Appellate Courts Will Rely On the Harmless Error Rule to Circumvent the Protections of the United States Constitution.

Probably the least defensible argument urged by the petitioner is that the harmless error rule, if permitted to survive, will be the vehicle for appellate judges to circumvent the protections of the United States Constitution. The argument, apparently, is that the appellate judges, both state and federal, will be impelled to find that there was constitutional

<sup>11</sup>Summary of antecedent state recognition of constitutional rights established by this Court in the listed cases:

<u>State:</u>	<u>Constitutional Right Recognized in:</u>
Alabama:	Mapp; Griffin
Alaska:	Mapp; Gideon; Griffin
Arizona:	Gideon
Arkansas:	Gideon
California:	Mapp; Miranda
Colorado:	Gideon; Griffin
Connecticut:	Gideon
Delaware:	Mapp; Griffin
Florida:	Mapp; Griffin
Georgia:	Gideon; Griffin
Hawaii:	Mapp; Gideon; Griffin
Idaho:	Mapp; Gideon; Griffin
Illinois:	Mapp; Gideon; Griffin
Indiana:	Mapp; Griffin
Iowa:	Gideon
Kansas:	Griffin
Kentucky:	Mapp; Gideon; Griffin
Louisiana:	Griffin
Maine:	Gideon; Griffin
Maryland:	Mapp; Griffin
Massachusetts:	Gideon; Griffin
Michigan:	Mapp; Gideon; Griffin
Minnesota:	Gideon; Griffin

error but they will unjustifiably dismiss it as mere harmless error.

It is true that judges will differ in their views on the results in the application of the harmless error rule. It is not unusual to find dissenting opinions of judges who feel that an error was prejudicial or not prejudicial depending upon the record and all the circumstances in the case. See, for example, *Kotteakos v. United States*, 328 U.S. 750 (1946), where Justice Douglas dissented from the order reversing the conviction on the ground that the error was harmless. But this is true of all questions of law, and the sug-

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<u>State:</u>	<u>Constitutional Right Recognized in:</u>
Mississippi:	Mapp; Griffin
Missouri:	Mapp; Gideon; Griffin
Montana:	Mapp; Griffin
Nebraska:	Griffin
Nevada:	Gideon; Griffin
New Hampshire:	Griffin
New Jersey:	
New Mexico:	
New York:	Griffin
North Carolina:	Mapp; Griffin
North Dakota:	Gideon; Griffin
Ohio:	Gideon
Oklahoma:	Mapp; Griffin
Oregon:	Mapp; Gideon; Griffin; Miranda
Pennsylvania:	Griffin
Rhode Island:	Mapp; Gideon; Griffin; Miranda
South Carolina:	Griffin
South Dakota:	Mapp; Gideon; Griffin
Tennessee:	Mapp; Griffin
Texas:	Mapp; Griffin
Utah:	Griffin
Vermont:	Griffin
Virginia:	Griffin
Washington:	Mapp; Gideon; Griffin
West Virginia:	Mapp; Gideon; Griffin
Wisconsin:	Mapp; Griffin
Wyoming:	Mapp; Griffin

gestion seems to be, not that the appellate judges will make mistakes, but that they will consciously apply the harmless error rule in order to avoid the enforcement of constitutional rights.

This approach brings full circle an argument advanced periodically. The police cannot be trusted. The prosecutors cannot be trusted. The trial judges cannot be trusted. And now it is said the appellate judges cannot be trusted. No doubt that public officers, including judges, make mistakes, but to predicate a constitutional ruling on the assumption that appellate judges will misuse and distort what is otherwise a valid rule in order to deny constitutional rights is to accept either a paranoiac view of the universe, or, if this view is a true one, to perpetuate a system of the administration of justice which should be done away with. We cannot accept the proposition that the appellate judges will misuse this doctrine. In fact, we believe the contrary to be the case, and we think this Court should make it clear that it does not accept this unwarranted suspicion.

**B. The California Standard of Harmless Error May Be Applied to Illegally Obtained Evidence Without Impairing the Protections Guaranteed by the United States Constitution.**

Petitioner seems to assume that if any harmless error rule may be applied in a case involving illegally obtained evidence then the standard of harmless error must be that stated in *Fahy v. Connecticut*, to wit, whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction (375 U.S. at 86-87).



The majority opinion in *Fahy v. Connecticut* did not purport to determine what standard might be applicable, although the majority opinion does appear to assume that the federal standard is controlling.

"On the facts of this case, it is not now necessary for us to decide whether the erroneous admission of evidence obtained by an illegal search and seizure can ever be subject to the normal rules of 'harmless error' under the federal standard of what constitutes harmless error. Compare *Ker v. California*, 374 U.S. 23." 375 U.S. at 86.

We cannot construe this language as foreclosing the question of the permissible standard. We have examined the record before the Court in *Fahy* and find no discussion whatever of this question in the briefs. The opinion does not purport to deal with the question at any length nor does it refer to any supporting authorities or any of the considerations which might underlie a decision of that kind.

Justice Harlan, in his dissenting opinion joined in by three other Justices, appears to agree with this conclusion.

"There is no need to consider whether a state or federal standard of harmless error governs since the state standard applied here is as strict as any possible federal standard." 375 U.S. at 95, n. 2.

We think that the Court should decide the question of the permissible standard, if any standard of harmless error is permissible. And we see no reason why the California standard should not be held valid. This



standard was adopted in 1911 by vote of the people and re-enacted on November 8, 1966 by the people as a part of the newly revised constitution of the state.<sup>12</sup> We think that if a portion of the state Constitution is to be struck down in whole or in part then a decent respect for the people of California requires that some consideration be given to the question of its validity.

1. **There Is No Reason to Impose a Uniform Standard of Appellate Review on the States Nor to Alter the Federal Rule as Enacted by Congress.**

There may be some superficial appeal to the notion that a uniform rule of appellate review should be applicable throughout the length and breadth of this country when the question raised on appeal involves a denial of federal constitutional rights. We think the appeal, upon careful consideration, is more to the aesthetic sense and the desire for symmetry than to its relationship to any substantial protection of federal constitutional rights. Much the same appeal for absolute uniformity in the rules governing search and seizure was rejected by this Court in *Ker v. California*. The reasons compelling rejection of an absolute and uniform rule are much more compelling in regard to a harmless error rule than they were in *Ker* in regard to the rules governing searches and seizure.

<sup>12</sup>The state constitution was revised by the passage of Proposition 1A on the November, 1966 ballot. *Cal. Const.* art. VI, § 4½ becomes *Cal. Const.* art. VI, § 13. See Assembly Constitutional Amendment 13, Res. Ch. 139, 1966, 1st Ex. Sess.

The main distinction is that the harmless error rule has no direct impact on federal constitutional rights. The rule does not purport to construe the effect or the applicability of such rights. It does not enhance the scope of the rights. It cannot limit the scope of those rights, except to the negative extent envisaged by Chief Justice Traynor in *People v. Parham*, *supra*. The rule is purely one of judicial administration. It governs the relationship between the trial and the appellate courts.

If the appellate judges of the state, or the federal appellate judges in a circuit court of appeals, used the harmless error rule as a device for deprecating, derogating, or dismissing federal constitutional rights, this Court sits to bring such judges to a halt. That was certainly not done in this case, nor is there any reason to anticipate that it will be done.

Finally, it must be remembered that the harmless error rules of the several states and the United States government were not created as a means of coping with what some persons may view as unnecessary or undesirable federal constitutional rights. The rules preceded the declaration of most of the specific federal constitutional rulings with which we are concerned. Indeed, the roots of the harmless error rule go deep in our legal history. It had its origins in the common law of England<sup>18</sup> and has existed for cen-

<sup>18</sup>See, e.g. *Rex v. Ball*, Russ. & Ry. 132, 168 Eng.Rep. 721 (1807). "Whether the judges on a case reserved would hold a conviction wrong on the ground that some evidence had been improperly received, when other evidence had been properly admitted that was of itself sufficient to support the conviction, the

turies, overshadowed only briefly by the unfortunate but illuminating experiment with the Exchequer or reversible "per se" rule in the Nineteenth Century.<sup>14</sup> The California harmless error rule, and the federal rule, were both the result of the agitation in the early part of this century under distinguished professional sponsorship headed by great legal authorities to undo the so-called "Exchequer rule." The popular dissatisfaction with the reversal of criminal judgments upon the basis of technical rulings required that the confidence of the people be restored in the system of the administration of criminal justice. See *Kotteakos v. United States*, 328 U.S. 750, 758-759 (1946).

The purpose of the rule was set forth by Justice Rutledge, no friend of circumvention of constitutional rights:

"The general object was simple: To substitute judgment for automatic application of rules; to preserve review as a check upon arbitrary action - and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multi-

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Judges seemed to think must depend on the nature of the case and the weight of the evidence. If the case were clearly made out by proper evidence, in such a way as to leave no doubt of the guilt of the prisoner in the mind of any reasonable man, they thought that as there could not be a new trial in felony, such a conviction ought not to be set aside because some other evidence had been given which ought not to have been received. But if the case without such improper evidence were not clearly made out, and the improper evidence might be supposed to have had an effect on the minds of the jury, it would be otherwise." Russ. & Ry. at 133, 168 Eng. Rep. at 721. See generally I Wigmore Evidence § 21 (3d Ed. 1940).

<sup>14</sup>*Crease v. Barrett*, 1 C.M. & R. 983, 149 Eng. Rep. 1353 (Ex. 1835). See generally I Wigmore, *op. cit. supra*, note 13.



plicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect in a printed record." 328 U.S. at 759-760.

Moreover, Justice Rutledge was satisfied that the verbal formula or precise rule was not critical:

"Easier was the command to make than it has been always to observe. This, in part because it is general; but in part also because the discrimination it requires is one of judgment transcending confinement by formula or precise rule. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 240. That faculty cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights; and what really affects the latter hurtfully. Judgment, the play of impression and conviction along with intelligence, varies with judges and also with circumstance. What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another." 328 U.S. at 761.

Consequently, we cannot believe that the verbal formula is of constitutional dimensions.

The beginning and the end of the concern of this Court is that federal constitutional rights are protected. Provided that the state standard of harmless error as conceived and as administered accomplishes this purpose, then the state rule should stand regardless of the verbal formula expressed. We submit that the California harmless error rule does meet these standards.



**2. A State Harmless Error Rule Is Valid Provided That It Adequately Protects Federal Constitutional Rights and the California Rule Meets That Standard.**

The California harmless error rule, as adopted by vote of the people in 1911 and re-adopted by vote of the people on November 8, 1966 as a part of the revision of the California Constitution, reads as follows:

"No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Calif. Const. art. VI, §41½<sup>18</sup>.

The authoritative interpretation of this constitutional provision is that stated in *People v. Watson*, 46 Cal.2d 818, 299 P.2d 243 (1956):

"That a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." 46 Cal.2d at 836, 299 P.2d at 254.

"Nevertheless, the test, as stated in any of the several ways, must necessarily be based upon rea-

<sup>18</sup>The newly adopted Cal. Const. art. VI, § 13 substitutes the word "cause" for the word "case" as it appears in Cal. Const. art. VI, § 4½. See Assembly Constitutional Amendment 13, Res. Ch. 139, 1966, 1st Ex. Sess.

sonable probabilities rather than upon mere possibilities; otherwise the entire purpose of the constitutional provision would be defeated." 46 Cal.2d at 837, 299 P.2d at 255.

Does this rule adequately protect federal constitutional rights? We submit that it does.

First of all, this rule does not permit the affirmance of a judgment on the ground that there is, apart from the inadmissible evidence, sufficient evidence of guilt to support the conviction. Any notion that the independently sufficient evidence rule is embraced within the California harmless error rule has been set to rest by California case law<sup>16</sup>. It is the duty of the appellate court in California to appraise the effect of the inadmissible evidence upon all of the evidence that was received, bearing in mind the probable impact of the inadmissible evidence on the trier of fact. The many decisions of this Court denouncing the independently sufficient evidence rule, particularly as applied to involuntary confessions, finding its most recent expression in *Miranda v. Arizona*, 384 U.S. 436, at 481 n.52, have no adverse impact on the California harmless error rule.

Where an involuntary confession is concerned the California harmless error rule affirmatively requires, as the decisions of this Court seem to require, reversal

<sup>16</sup>See, e.g., *People v. Patubo*, 9 Cal.2d 537, 71 P.2d 270 (1937); *People v. Mahoney*, 201 Cal. 618, 258 Pac. 607 (1927); *People v. Geibel*, 93 Cal.App.2d 147, 208 P.2d 743 (1949); *People v. Duvernay*, 43 Cal.App.2d 823, 111 P.2d 659 (1941).

regardless of the other evidence and regardless of the probable effect of the confession. *People v. Dorado*, *supra*; *People v. Sears*, 62 Cal.2d 737, 401 P.2d 938 (1965). Cf. *People v. Jacobson*, 63 Cal.2d 319, 405 P.2d 555 (1965), *cert. denied*, 384 U.S. 1015 (1966).

The second area in which it is clear that the protection of federal constitutional rights requires a reversal in all instances is where a defendant has been deprived of a fair trial, that is, where the integrity of the fact-finding process has been impaired by some error in procedure, even though the evidence of guilt may be practically conclusive. The California harmless error rule recognizes the validity and the soundness of this doctrine and has applied it to a variety of situations over the course of many years. *People v. McKay*, 37 Cal.2d 792, 236 P.2d 145 (1951) (unfair pre-trial publicity); *People v. Sarazzawski*, 27 Cal.2d 7, 161 P.2d 934 (1945) (various errors culminating in denial of a fair trial); *People v. Patubo*, 9 Cal.2d 537, 71 P.2d 270 (1937) (disparaging comments by trial judge); *People v. Muza*, 178 Cal.App.2d 901, 3 Cal. Rptr. 395 (1960), *cert. den.*, 369 U.S. 839 (1962) (remarks of trial judge); *People v. Duvernay*, 43 Cal.App.2d 823, 111 P.2d 659 (1941) (misconduct of prosecutor).

If two principles can be said to have been incorporated into the harmless error rule as if they were set forth in *haec verba*, it is that a conviction cannot stand if an involuntary confession has been received in evidence or if the defendant has been denied, in any of a variety of ways, a fair trial.



We are startled by the suggestion of petitioner that *People v. Parham, supra*, in applying the harmless error rule to illegally obtained evidence of minor importance, somehow deviated or departed from the decisions holding that denial of a fair trial required reversal (Brief for Petitioner 73). This very Court in *Linkletter v. Walker, supra*, held that the admission of illegally obtained evidence did not impair the integrity of the fact-finding process, or, to put it bluntly, deny the defendant a fair trial. If that is so, then the admission of an item of illegally obtained evidence which is not prejudicial in light of the whole record certainly cannot be said to constitute the denial of a fair trial.

To sum it up, the California harmless error rule does not vest in appellate court judges the power to determine guilt or innocence. Nor does it authorize appellate court judges, once convinced of the guilt of the defendant, to dismiss or disregard errors, either constitutional or statutory. We think that the California harmless error rule, when fairly assessed in light of its administration and application, squares in substance with the construction placed by Justice Rutledge on the federal harmless error rule in *Kotteakos v. United States, supra*.

Justice Rutledge was less concerned with the verbal formulation of the harmless error rule than he was with the principles it expressed governing the review of criminal judgments, principles which are rooted in our legal history. While the federal statute did not draw a parity between criminal and civil cases, nor



change the burden of proof placed upon the prosecution, he was strong in emphasizing that the effect of an error in receiving or excluding evidence had to be weighed carefully in light of the other evidence.

He emphasized that it was not the duty of the appellate court to determine guilt or innocence, nor to speculate upon probable reconviction and decide according to how the speculation might come out. But he was careful to point out that this did not mean that the appellate court must ignore the outcome:

"But this does not mean that the appellate court can escape altogether taking account of the outcome. To weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum. Cf. *United States v. Socony-Vacuum Oil Co.*, *supra*, at 239, 242. In criminal causes that outcome is conviction. This is different, or may be, from guilt in fact. It is guilt in law, established by the judgment of laymen. And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting. Cf. *United States v. Socony-Vacuum Oil Co.*, *supra*, at 239, 242; *Bollenbach v. United States*, *supra*, 614.

"This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his

own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record." 328 U.S. at 764.

Justice Rutledge sums it up in the following sentence:

"If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress." 328 U.S. at 764-765<sup>17</sup>.

While there may be some difference in emphasis between the California harmless error rule and the federal rule as enacted by Congress and interpreted in *Kotteakos*, we are satisfied that the difference is solely in emphasis and in language and does not go to the substantial question of the protection of constitutional rights. Indeed the California rule stands on a parity with the federal decisions and affirmatively protects federal constitutional rights by requiring reversal where the denial has an effect of inherent prejudice, as with coerced confessions, or where the denial results in the denial of a fair trial.

<sup>17</sup>That the Justice refers here solely to involuntary statements is made clear by his footnote:

<sup>18</sup>Thus, when forced confessions have been received, reversals have followed although on other evidence guilt might be taken to be clear. See *Malinski v. New York*, 324 U.S. 401, 404; *Lyons v. Oklahoma*, 322 U.S. 596, 597 n. 1; *Bram v. United States*, 168 U.S. 532, 540-542; *United States v. Mitchell*, 137 F.2d 1006, dissenting opinion at 1012.

We cannot believe that constitutional validity hinges on the use of the word "possible" rather than "probable." If the validity of a rule of judicial administration enacted twice in this century by the people of California rests on a distinction of this kind, then we can expect a renewal of the concern expressed in the early part of this century over the technical splitting of hairs in the administration of criminal justice.

3. Since *Ker v. California* Permits the States to Develop Workable Rules Governing Search and Seizure Subject Directly to and Indeed Carrying Out the Fourth Amendment, Then the Long Established State Harmless Error Rules, Which Do Not Bear Directly Upon Any Provision of the United States Constitution, Should Be Sustained.

In *Ker v. California, supra*, this Court upheld the development by the states of rules governing arrests, searches and seizures to meet the practical demands of effective criminal investigation and law enforcement. The Court imposed two conditions. First, that the rules themselves not violate the command of the Fourth Amendment prohibiting unreasonable searches and seizures. Secondly, that evidence seized in violation of the constitutional standards be inadmissible on objection of one who has standing to complain.

"Such a standard implies no derogation of uniformity in applying federal constitutional guarantees but is only a recognition that conditions and circumstances vary just as do investigative and enforcement techniques." 374 U.S. at 34.

This recognition of the power of the states to develop independent standards directly bearing on the

Fourth Amendment gives strong support to a recognition of the power of the states to regulate the administration of their own courts and the power of Congress to regulate the administration of the federal courts. Here there is no direct relation to any federal constitutional guarantees nor any attempt to water down or expand upon those guarantees.

Here there is only an attempt, and a successful attempt, to allay the distrust of the people in the administration of justice and to prevent unnecessary and unwarranted retrials. So long as the state standard adequately protects federal constitutional rights, we can perceive no federal constitutional objection to it, however it may be formulated.

4. If the California Harmless Error Rule Is Valid, Then the Reliance by the State Appellate Court Upon That Rule in Deciding This Case Constitutes an Independent and Adequate State Ground for Decision, Thus Barring Review on the Question of the Correctness of the Application of the Rule.

If a state appellate court may properly apply the state harmless error rule to the question of whether a defendant has been prejudiced by the use of illegally obtained evidence at his trial, provided that the state standard of harmless error is valid under the federal constitution, then the question of whether the state standard has been correctly applied is purely one of state law and not reviewable by the United States Supreme Court. Thus, the California District Court of Appeal, in determining that the illegally obtained evidence that had been used in Cooper's trial did not prejudice him, was basing its decision upon an adequate and independent state ground.



It is clear that this Court will not review such state court judgments.

"It is a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the co-presence of federal grounds. See, e.g., *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449; *Fox Film Corp. v. Muller*, 296 U.S. 207.<sup>12</sup> *Fay v. Noia*, 372 U.S. 391, at 428 (1963); *Durley v. Mayo*, 351 U.S. 277 (1956); *Buck v. California*, 343 U.S. 99 (1952); *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940); *Murdock v. Memphis*, 20 Wall. 590 (1875).<sup>13</sup>

The reasons for the rule have been stated as follows:

"The reason [for the adequate state ground rule] is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its

<sup>12</sup> "We need not decide whether the adequate state-ground rule is constitutionally compelled or merely a matter of the construction of the statutes defining this Court's appellate review. *Murdock* itself was predicated on statutory construction, and the present statute governing our review of state court decisions, 28 U.S.C. § 1257, limited as it is to "*judgments or decrees rendered by the highest court of a State in which a decision could be had*" (italics supplied), provides ample statutory warrant for our continued adherence to the principles laid down in *Murdock*." *Fay v. Noia*, 372 U.S. 391, 430, n. 40 (1963).

views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945).

We must distinguish at this point between the validity of the harmless error standard itself, which we concede raises a federal question, and the correctness of the application of that state standard, which we submit is not a federal question at all and is indeed an adequate and independent state ground of decision.<sup>19</sup> The judgment here rests, not on the decision as to the legality of the search or the scope of the Fourth Amendment or the rights incident thereto, but purely upon the effect of that evidence—no matter what the reason for its inadmissibility—upon the course of the proceedings and the result of those proceedings. The same rule, the state harmless error rule, is applied to non-federal questions of evidence and procedure and applied uniformly and fairly.

Consequently, the application of the harmless error standard does not run afoul of the reasons which have sometimes motivated this Court in refusing to consider a state ground adequate and independent.

"But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other,

<sup>19</sup>We are not unaware of this Court's refusal, in *Napue v. Illinois*, 360 U.S. 264, 271-72 (1959), to be bound by the state court's determination that the prosecutor's knowing use of perjured testimony had no effect on the outcome of the trial. But the harmless error rule applied by that state court was constitutionally defective, since it did not require reversal for an error which necessarily denied the accused a fair trial.

our jurisdiction is plain." *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931), quoting from *Enterprise Irrig. Dist. v. Farmers Mut. Canal Co.*, 343 U.S. 157, 164 (1917).

Here, the non-federal ground is not interwoven with the federal ground whatever. The question of the effect of the evidence upon the outcome has nothing whatever to do with the question of the admissibility of the evidence in light of the reasonableness of the search.

Moreover, it is clear that the state ground—the harmless error rule—is of sufficient breadth to sustain the judgment without any decision of the federal ground, that is, the admissibility of the evidence. Indeed, it is common practice in many appellate courts to decline to review the question of admissibility when it is plain that the error, if any, did not prejudice the defendant.<sup>20</sup>

The only conceivable basis that we can imagine for deeming the application of the harmless error rule to constitute a federal question is that the application of the rule may impair the deterrent effect of the exclusionary rule itself. We are satisfied that we have demonstrated above that there is no foundation whatever to this belief.

<sup>20</sup>See, e.g., *Hernandez v. United States*, 353 F.2d 624 (9th Cir. 1965); *United States v. McCall*, 291 F.2d 859 (2d Cir. 1961); *United States v. Peres*, 242 F.2d 867 (2d Cir.), cert. denied, 354 U.S. 941 (1957); *United States v. H.J.K. Theatre Corp.*, 236 F.2d 502 (2d Cir. 1956), cert. denied, 352 U.S. 969 (1957); *Rogers v. United States*, 128 F.2d 973 (5th Cir. 1942); *State v. Stevens*, 41 Wash.2d 694, 251 P.2d 163 (1953); *Pulaski v. State*, 24 Wis.2d 450, 129 N.W.2d 204 (1964).

Finally, we must allude again to the opinion of Mr. Justice Harlan, joined in by three other justices of this Court:

"Evidentiary questions of this sort are not a proper part of this Court's business, particularly in cases coming here from state courts over which this Court possesses no supervisory power." *Fahy v. Connecticut, supra*, at 92 (dissenting opinion).

By the same token, the application of the federal harmless error rule by the intermediate federal appellate courts does involve a federal question by reason of this Court's supervisory power over the lower federal courts and the power of this Court to construe the federal harmless error statute and insure its correct application. This Court has never assumed to itself such supervisory authority over the state courts, nor can we imagine any reason why the federal harmless error statute should be imposed upon the state courts, nor do we believe that it was ever the intent of Congress that it be so imposed.

It is true that the California District Court of Appeal alluded to the standard stated in *Fahy v. Connecticut* in resolving the question of harmless error. We do not consider this as controlling.

The California District Court of Appeal reached the conclusion that "... such error was not sufficiently prejudicial under either test of prejudice urged by the defendant." (R. 269). The "either test" refers to the California harmless error rule as enunciated in *People v. Watson, supra*, and the standard stated in *Fahy v. Connecticut, supra*. Admittedly, the



California court did discuss the *Fahy* standard and concluded that petitioner was not prejudiced under this test.

In *Department of Mental Hygiene of California v. Kirchner*, 380 U.S. 194 (1965), this Court clearly stated its position when the decision of a state court involves both state and federal grounds:

"An examination of the opinion of the California Supreme Court in the case before us does not indicate whether that court relied on the State Constitution alone, the Federal Constitution alone, or both; and we would have jurisdiction to review only if the federal ground had been the sole basis for the decision, or the State Constitution was interpreted under what the state court deemed the compulsion of the Federal Constitution." *Id.* at 198.

From an analysis of the state court opinion, it is clear that the court relied on both upon the California harmless error rule and the *Fahy* standard:

"We cannot say there has been a miscarriage of justice. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Nor, *assuming without deciding that*, as defendant would have it, we are called upon to inquire whether 'there is a reasonable possibility that the evidence complained of might have contributed to the conviction' (*Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87), are we of the opinion that such reasonable possibility here exists." (R. 270). (Emphasis added.)

Therefore, the federal ground is not the sole basis for the decision, nor was the state constitution inter-

preted under what the state court deemed the compulsion of the federal constitution.

Reference to the *Fahy* decision has not been uncommon in recent years in California because the verbal formula expressed in that decision has been urged by counsel for the appellants in many cases. The willingness of the California court to apply the *Fahy* test at the behest of the defendant should not bar this Court from clearly deciding the validity of the California harmless error rule and setting forth the proposition that the correctness of the application of that rule is a matter for the state courts to determine.

5. If the State Harmless Error Rule Is Valid, Then a Decision Based Upon That Ground Should Be Respected in Federal Habeas Corpus Proceedings.

Petitioner argues that there should be no double standard of review in illegal evidence cases, one for the state courts and the other for the federal courts (Brief for the Petitioner 38). As a matter of fact, there are different standards. The federal appellate courts apply the federal harmless error rule as enacted by Congress, and the majority of the federal appellate courts apply that rule to illegally obtained evidence cases. The California appellate courts, as they are required to do, apply the rule adopted by the people of California. Other states presumably apply their own harmless error rules as enacted by their own state legislatures or by judicial decision. The thrust of appellant's argument seems to be not that there should be a uniform standard but that there

should be no standard whatever, that is, any "unconstitutional error" should amount to prejudicial error per se and require an immediate reversal without regard to examination of the record. Moreover, he suggests that the same rule should be applied by federal habeas courts when detention under a state court judgment is attacked (Brief for the Petitioner 40).

There is no doubt that petitioner's solution to the problem would simplify matters a great deal. Show that some item of evidence, no matter how insignificant, should have been excluded under the search and seizure rules and you have instant reversal or instant habeas corpus. But the simplest answer is not necessarily the best, nor does it comport with the needs of our federal system.

If the California harmless error rule is valid, then we submit that the judgment should be affirmed and, by the same token, the state prisoner should not be able to seek relief in federal habeas corpus. This may not be the time or the place to decide the habeas corpus question. But at least two things should be noted.

First of all, the decision of this Court in *Fay v. Noia*, 372 U.S. 391 (1963), does not foreclose a rule which would give respect to the state harmless error rule. The Court carefully limited its ruling in *Fay v. Noia* to the effect of procedural default which, in the view of the Court, amounted to a doctrine of forfeitures.

"A practical appraisal of the state interest here involved plainly does not justify the federal

courts' enforcing on habeas corpus a doctrine of forfeitures under the guise of applying the adequate state-ground rule." 372 U.S. at 433.

The Court carefully circumscribed its holding:

"For these several reasons we reject as unsound in principle, as well as not supported by authority, the suggestion that the federal courts are without power to grant habeas relief to an applicant whose federal claims would not be heard on direct review in this Court because of a procedural default furnishing an adequate and independent ground of state decision." 372 U.S. at 434.

We are not concerned here with procedural defaults, forfeitures, or the like. We are concerned with the integrity of a valid state law governing the administration of the courts. The controlling law is state law. Contrast *Fay v. Noia*:

"In *Noia's* case the only relevant substantive law is federal—the Fourteenth Amendment. State law appears only in the procedural framework for adjudicating the substantive federal question. The paramount interest is federal." 372 U.S. at 431.

When the federal right has been recognized, and indeed the search held unreasonable and the products of the search held inadmissible, the validity of the conviction and the continued confinement depends on the state law determination that the defendant was not prejudiced by the evidence. The only relevant substantive law is state. The paramount interest is state.



It would be anomalous to permit or authorize a federal district judge to resolve the question of harmless error, when that question has been passed on by state appellate courts. The question is peculiarly one for the appellate courts, as recognized in the *Kotteakos* opinion. It is doubtful that any remnants of the integrity of the state administration of criminal justice could remain if the question of harmless error were to be pressed, not only to the various levels of state appellate courts, but through the federal district court, the circuit court of appeals, and finally to this Court. We submit that this Court should evince its confidence in the integrity of state court judges and leave to those judges the responsibility of determining what is peculiarly within their area of competence, that is, the effect upon the outcome of the trial of a given error, even when that error involves illegally obtained evidence.

**C. The Inadmissible Evidence Did Not Prejudice the Petitioner.**

In attempting to show that the admission into evidence of the scrap of brown paper<sup>21</sup> could have contributed to the conviction, petitioner lists a number of "weaknesses" he claims to find in the prosecution's case.

Before considering these claims, let us examine the essential evidence, apart from the scrap of paper, adduced by the prosecution.

<sup>21</sup>Petitioner does not here complain of the introduction of a single marijuana seed taken from his automobile in a subsequent search. Whatever probative value this seed might have in a prosecution for possession or sale of marijuana, it had none whatever in the instant case, where petitioner was charged with sale of heroin. The trial court said as much when admitting it (R. 102).

The testimony of the investigating officers—local, state and federal—showed that Green, the informant, was thoroughly searched (R. 45, 46, 58, 77). He then accompanied one of the officers to a telephone booth, where he dialed the number of the house where petitioner was living (R. 47, 73). An officer listened to the ensuing conversation with a twin phone (R. 47). A woman answered the telephone and Green asked for "Joe." When "Joe" answered, Green arranged to meet "Joe" right away at Newell's Market for the purpose of buying heroin. The officer recognized "Joe's" voice as that of petitioner (R. 49). Shortly thereafter, officers who were keeping petitioner's house under surveillance saw a person who fit the description of petitioner leave the house, walk to a blue 1957 Oldsmobile parked in front, open the trunk, stand by the trunk for some minutes, and then enter the car and drive off in the direction of Newell's Market (R. 180).

Meanwhile, Green and the officers had stationed themselves near Newell's Market (R. 51). Agent Armenta saw Cooper drive his blue Oldsmobile into the parking lot. He positively identified petitioner as the driver (R. 53). Green went on foot to the parking area and was seen to converse with the driver of a blue 1957 Oldsmobile, who appeared to be petitioner (R. 84). After a few minutes, Green left the parking area and went back to where the officers were standing. He turned over two bindles of heroin (R. 54, 157, 158, 161-62). Green was under surveillance at all times, as was the driver of the Oldsmobile from the

time he entered the parking area. Green was thereafter thoroughly searched again.

The agents who had observed petitioner leave his house drove to the market area. One of them testified that he saw Green in the parking lot leaving the same car and driver which he saw depart from Cooper's residence (R. 189).

These facts conclusively show guilt. The searches demonstrate that Green had no heroin before contacting the driver of the Oldsmobile, and had none after he had turned the two bundles over to the officers. Petitioner's voice was positively identified at the time the meeting was arranged by telephone. Petitioner was positively identified as the driver of a blue 1957 Oldsmobile which entered the parking area of Newell's Market. Green was seen to converse with the driver of such an automobile, who appeared to be the petitioner. Green was constantly under surveillance, and had no opportunity to procure heroin other than from the driver of that vehicle.

The petitioner is, as might be expected, critical of most of this evidence. He makes much of the fact that the prosecution did not produce the informer as a witness at the trial. But he also claims that the informer was an unreliable and untrustworthy witness. For what he was worth, he was as available to the defense as to the prosecution (R. 208). And everything material to which he could have testified was proved by the testimony of other witnesses. There was no reason for the prosecution to call him.

Petitioner claims that the marked money given to the informant for the buy was never found on the petitioner. But he does not point out that he was not arrested for more than two hours after the sale so that he had ample time to rid himself of the twenty dollars (R. 158-59).

While Agent Armenta may not have kept the informer in his view at all times, the group of agents had him under continual surveillance during the critical period when he left the car and contacted Cooper. Petitioner notes a conflict between the testimony of Agent Groom and that of Lieutenant Sullivan over whether the informer actually entered petitioner's car. But there is no conflict over the identity of the driver of that car—Joe Cooper.

The District Court of Appeal disagreed with petitioner:

"Here the evidence . . . establishes the sale by sufficient circumstantial evidence based upon an adequate presale search of the informant followed by a continuous visual observation of him by the officers as a group between the time of said presale search and the time of the ultimate delivery of the heroin by him to the officers after the sale, thereby eliminating any 'gap' in the surveillance and any claim of his contact with any person other than defendant. . . . This chain of circumstances has its own factual integrity. It effectively linked defendant to the heroin admitted in evidence and did not require as one of its links the brown piece of paper here in dispute." (R. 270).



Petitioner contends, however, that the foregoing facts amount to such a weak case that the trial court might have found it necessary to rely for its conclusion on the admission of a scrap of brown paper taken from petitioner's automobile. This scrap of paper was a torn piece of grocery sack. It was established that the bindles which Green turned over to the officers were wrapped in brown grocer-sack paper.

The probative value of this scrap of paper, in the view of the District Court of Appeal, was dubious at best:

"Indeed, in the light of the entire record, including the compelling characteristics of the sale and presale search, we are at a loss to understand what actual probative value this piece of an ordinary paper bag could possibly have, there being no testimony establishing that it was a piece of the same paper in which the heroin was wrapped." (R. 270.)

Moreover, insofar as Cooper's possession of brown paper in the car tended to prove that he was the person who delivered heroin in brown paper to Green, the scrap of brown paper found in the car was only cumulative of competent evidence already in the record. At the time of his arrest, Cooper swallowed an object wrapped in brown paper (R. 90, 100, 114).

The introduction of the scrap of brown paper found in the car proved to be a mistake, but it was a good-faith mistake, based on the law as it stood at the time of the trial. Had the prosecutor even suspected that the search which produced the scrap of paper would

prove, through a change in the law, to have been illegal, it is inconceivable that he would have jeopardized his entire case by introducing this minor and cumulative piece of evidence.

Contrast the role of this scrap of paper with that of the illegally seized evidence in *Fahy v. Connecticut*, 375 U.S. 85 (1963). In that case, petitioner had been convicted of painting swastikas on a synagogue. The paint and brush used for this purpose had been illegally seized. This Court's holding that the use of this evidence necessarily prejudiced petitioner was based on five factors, none of which is present in the instant case:

(a) "[T]he tangible evidence of the paint and brush was itself incriminating." *Id.* at 88. The paint and brush were the very instrumentalities with which the crime was committed. As such, they were as incriminating as would be the murder weapon in a trial for that crime. By contrast, the scrap of paper here was not involved in the commission of the crime and was utterly innocuous in itself.

(b) The paint and brush were used to corroborate the testimony of an officer in placing Fahy near the scene of the crime. The piece of paper in the instant case, however, has no corroborative value in placing petitioner at the scene.

(c) The evidence in *Fahy* served as the basis for an opinion that the paint and brush matched the markings on the synagogue. In our case, as petitioner points out, there was no testimony that the paper

found was of the same kind as that used to wrap the bindles.

(d) There was a strong possibility in *Fahy* that the police used the paint and brush to induce petitioner's confession. In the instant case, we have no confession.

(e) The introduction in evidence of the paint and brush may have induced petitioner to take the stand and admit commission of the acts charged, basing his defense on the proposition that those acts did not constitute an offense. In the present case, petitioner took the stand and denied guilt.

A most important factor in *Fahy* was that the trial court, sitting without a jury, made four separate findings of fact (Nos. 8, 13, 14, 15) in which the paint and brush were mentioned. Record, p. 12, *Fahy v. Connecticut*, 375 U.S. 85 (1963). These negative the idea that the court was not fully aware of the illegally seized evidence, and tend to show that such evidence was relied on.<sup>22</sup>

In the instant case, however, we have a clear indication that the trial court, sitting without a jury, did

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<sup>22</sup>"To show prejudice in cases tried before a judge, [in federal courts] the appellant must affirmatively establish first that the trial court considered the inadmissible evidence in reaching his decision. Once having done so, he must shoulder the standard burden of showing that the evidence, so considered, affected the result. . . . The trial judge may have indicated his reliance upon the evidence during the trial or in an oral opinion. The judge's findings and written opinion, if any, are other sources for the appellant." Gibbs, *Prejudicial Error: Admissions and Exclusions of Evidence in the Federal Courts*, 3 Vill. L. Rev. 48, 68-69 (1957) (footnotes omitted).

not rely on the scrap of paper in question. In denying a motion to dismiss at the close of the prosecution's evidence, the court observed:

"Actually, I see no reason, Mr. Moran, to disbelieve at this point the basic testimony of the officers. I have no doubt that the defendant was out there. I have no doubt that Green was out there. I have no doubt that the contact was made. The two bindles are here. Agent Lee says they were turned over to him by Mr. Green after the contact." (R. 208).

Again, in announcing his conclusion, the court said:

"Well, gentlemen, there's no reasonable doubt, or otherwise in my mind, that the phone call was placed as testified and that the officers were outside the defendant's aunt's home; that he answered the phone there; that he did go over to Newell's Market and was identified there and met Mr. Green and Mr. Green thereafter did turn over the bindles in evidence to Agent Lee and they were found to be heroin. And the Court will find the defendant guilty as charged . . . ." (R. 242).

The court's emphasis, in these statements, on the events of the day of arrest, as related by the officers, and the reference to the bindles, make it abundantly clear that the court did not give any weight to the scrap of paper, and may even have overlooked it.

Accepting petitioner's contention that no distinction should be made between court trials and jury trials, it is nonetheless true that where an appellate court can ascertain from the remarks of the sole trier



of fact that the error complained of did not contribute to the conviction, reversal is not warranted.

It is submitted that there is no reasonable possibility that the error in admitting the scrap of brown paper might have contributed to the conviction. See *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963).

## II

### THE SEARCH OF A VEHICLE PROPERLY SEIZED AND LAWFULLY IN THE CUSTODY OF THE POLICE FROM THE TIME OF SEIZURE IS REASONABLE UNDER THE FOURTH AMENDMENT.

The facts established in the trial court concerning the circumstances of the search are as follows: petitioner was lawfully arrested for the offense of selling narcotics and was immediately taken into custody. At the same time, the arresting officers seized the automobile pursuant to a statutory mandate providing for the seizure and forfeiture of vehicles used in violation of the narcotics laws. The arrest of the petitioner and the seizure of his automobile were clearly lawful and no question has ever been raised as to the lawfulness of the arrest and seizure at any stage of the proceedings. A week after the car was seized an officer searched the petitioner's car and found a small piece of brown paper in the glove compartment. This paper was later introduced into evidence during the petitioner's trial.

The California District Court of Appeal held that a search of petitioner's properly seized and im-

pounded automobile was a violation of his constitutional rights under the Fourth Amendment to the United States Constitution and that the evidence obtained as a result thereof was inadmissible. The court relied solely on the federal Constitution in reaching its determination that the search was unreasonable (R. 263-67).

**A. The Search of a Vehicle Properly in the Custody of Law Enforcement Officials From the Time of Seizure Is Not an Unreasonable Search and Seizure Under the Fourth Amendment.**

**1. The Search of Petitioner's Vehicle Was Reasonable.**

The Fourth Amendment prohibits not all searches and seizures but only those which are unreasonable. *Carroll v. United States*, 267 U.S. 132 (1925). The Constitution does not define what are "unreasonable" searches and that definition cannot be made through the application of any fixed formula. *United States v. Rabinowitz*, 339 U.S. 56 (1950). Reasonableness is not a matter of abstract theory but a pragmatic question to be determined in each case in the light of its own facts and circumstances. *Go-Bart Importing Company v. United States*, 282 U.S. 344 (1931). The constitutional reasonableness or unreasonableness of a search or seizure should be related not only to the circumstances which occasion the arrest or search but also to the purpose and extent of the interference with liberty represented by the arrest or search. See *Agnello v. United States*, 269 U.S. 20 (1925); *United States v. Lefkowitz*, 285 U.S. 452 (1932). The distinction between a reasonable search and one which is un-

reasonable is to be drawn in each case in a manner which will conserve the public interest as well as the interest and rights of individual citizens. *Carroll v. United States, supra.*

The search and seizure in the instant case, under the totality of circumstances, was reasonable. Where an automobile used by an arrested person in the commission of the crime is properly impounded, officers do not act unreasonably in searching that vehicle or in removing its contents without a warrant.

Although an accused may be arrested many miles from the police station and many hours before his arrival at the station the search of the arrested person at the police station has been invariably upheld as a valid search. *United States v. Caruso*, 358 F.2d 184 (2d Cir. 1966); *Robinson v. United States*, 283 F.2d 508 (D.C.Cir.), cert. denied, 364 U.S. 919 (1960); *Whalem v. United States*, 346 F.2d 812 (D.C.Cir.), cert. denied, 382 U.S. 862 (1965); *State v. Menard*, 331 S.W.2d 521 (Mo. 1960); *Sheppard v. State*, 394 S.W.2d 624 (Ark. 1965); *People v. Shaw*, 237 Cal. App.2d 606, 47 Cal.Rptr. 96 (1965); *State v. Post*, 255 Ia. 573, 123 N.W.2d 11 (1963); *Commonwealth v. Lawton*, 348 Mass. 129, 202 N.E.2d 824 (1964); *State v. Papitsas*, 80 N.J.Super. 420, 194 A.2d 8 (1963).

In such cases the examination of the suspect's property at the police station has been justified on the ground that it was incidental to a lawful arrest. Thus, in *Baskerville v. United States*, 227 F.2d 454 (10th Cir. 1955), the defendant was arrested by federal authorities and booked at the city jail, at which

time his personal property was placed in an envelope and stored with the jail custodian. It was there held that when federal authorities two weeks after the arrest examined the defendant's property and found a forged identification card, the search was valid as incidental to the arrest.

\* An examination and search of the property of a suspect at a police station and not at the scene of the arrest and at some time remote from the arrest can hardly be justified under the traditional concept of being incidental to the arrest. Rather, the real justification is that the property is properly in the custody of the authorities and a later search and examination of the property does not further impair the right of privacy.

It is standard practice for police officers to inventory the contents of a vehicle being impounded. This is necessary to protect the vehicle owner, the police, and the owner of the storage facility. The propriety of such an inventory has repeatedly been recognized. *People v. Garcia*, 214 Cal.App.2d 681, 29 Cal.Rptr. 609 (1963); *People v. Myles*, 189 Cal.App.2d 42, 10 Cal.Rptr. 733 (1961), *cert. denied*, 371 U.S. 872 (1962); *People v. Nebbitt*, 183 Cal.App.2d 452, 7 Cal.Rptr. 8 (1960); *People v. Ortiz*, 147 Cal.App.2d 248, 305 P. 2d 145 (1956). Contraband uncovered during an inventory is admissible evidence. *Ibid.* No greater invasion of privacy occurs when an impounded automobile is searched than occurs when a vehicle is inventoried upon impounding. In either case, police officers act reasonably.



When an automobile is in the lawful custody of the police, its contents are also in their possession. Therefore, removal of articles from the vehicle does not constitute a new seizure and cannot violate the proscription against unreasonable seizures. *People v. Odegard*, 203 Cal.App.2d 427, 21 Cal.Rptr. 515 (1962); *People v. Myles*, *supra*; *People v. Nebbitt*, *supra*; cf. *People v. Jeffries*, 31 Ill.2d 597, 203 N.E.2d 396 (1964).

The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State. *Schmerber v. California*, 384 U.S. 757, 767 (1966). It strains logic and reason to hold that police officers may seize a murderer's rifle, a burglar's sack, or any other instrumentality of the crime and at the same time hold the officers may not later search the instrumentality of the crime. Were such the law an officer could not later search the rifle for bullets, markings, or fingerprints. Similarly, he could not later search the sack for stolen goods, burglary tools, or other evidence. The privacy of a murderer is not invaded when the weapon in the police locker is later searched; the dignity of the burglar is not intruded upon when the sack in the custody room is later searched. To paraphrase Judge Kaufman in *United States v. Guerra*, 334 F.2d 138, 147 (2d Cir. 1964), *cert. denied*, 379 U.S. 936:

"If we were mechanically to invoke Massiah [Preston] to reverse this conviction, we would transform a meaningful expression of concern for the rights of the individual into a meaningless mechanism for the obstruction of justice."

In making the determination of what searches are reasonable, this Court must also consider society's interest in continuing to allow such searches. A search and examination of an instrumentality of the crime lawfully in the custody of the police is a traditional and necessary function of effective police investigation. Were this Court to deny enforcement officials the right to gather such evidence from an accused in lawful custody, a necessary weapon in the arsenal of detection would be severely impaired. In recent years this Court has announced constitutional principles that necessarily diminish the use of interrogation and, at the same time, encourage police investigation. *Miranda v. Arizona*, 384 U.S. 436, 477-81 (1966); *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964). As a practical matter, this Court cannot possibly insist that enforcement officials rely upon independent investigation and at the same time deny them an integral aspect of such investigations.

• In the instant case there was an offense committed by the petitioner, sale of narcotics, the police properly seized an instrumentality of that crime, the automobile, and thereafter examined the instrumentality for the fruits of that crime. It is unreasonable and illogical to say that when officers lawfully come into the possession of an instrumentality of the crime that they may not later lawfully examine it, unless they secure a search warrant.

## 2. A Warrant Is Not the Inevitable Prerequisite to a Reasonable Search.

There was sufficient time to secure a warrant prior to searching Cooper's car. The police did not do so. Prior to this Court's decision in *Preston v. United States*, 376 U.S. 364 (1964), there was no reason to regard this as a necessary step. Failure to obtain a warrant should not now be fatal to this search.

*Preston* held only that once an accused is under arrest and in custody, a warrantless search made at another time or place cannot be justified as incident to the arrest. 376 U.S. 364, 367. *Preston* did not hold unreasonable every warrantless automobile search not brought within a traditional exception to the general rule demanding warrants. "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case." *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950).

Unlike the search in *Preston* or that in *People v. Burke*, 61 Cal.2d 575, 394 P.2d 67 (1964), the search of Cooper's auto is not urged as incident to an arrest. Still, the law surrounding incidental searches is instructive for present purposes.

It is indisputable that the type of search regularly permitted as incident to an arrest bears little correlation to the historical justification for such searches: necessity. An intensive search of an accused's automobile, room, or apartment is commonly made after the accused has been arrested, handcuffed, and per-

haps placed under guard in a police squad car. Almost as frequently these searches are upheld as sufficiently contemporaneous in time and place to warrant the label "incident to arrest." Cf. *United States v. Rabinowitz, supra*; *Harris v. United States*, 331 U.S. 145 (1947). Often it is obvious that the accused was in no position to exercise control over any weapon, means of escape, or destructible evidence that might lie within the searched premises. And often, where a warrantless search of an automobile is justified by virtue of the great mobility of motor vehicles, it is clear that a police officer could have been stationed at the vehicle until a warrant was obtained.

The explanation for the apparent discrepancy between the reason and the rule here is that the test actually applied in these warrantless search cases is not necessity but reasonableness: did the officers conducting the search act reasonably within the meaning of the Fourth Amendment? This is a proper test, one which should be applied to the search of Cooper's automobile.

Petitioner's constitutional rights under the Fourth Amendment to the Constitution were not violated by the search conducted after both he and the automobile were in custody, in view of the fact that the identical search could have been conducted at the time and place of the seizure of the automobile. As was said by Mr. Chief Justice Vinson in the dissent in *Trupiano v. United States*, 334 U.S. 699, 714 (1948), subsequently overruled by *United States v. Rabinowitz*, 339 U.S. 56 (1950):



"To insist upon the use of a search warrant in situations where the issuance of such a warrant can contribute nothing to the preservation of the rights which the Fourth Amendment was intended to protect, serves only to open an avenue of escape for those guilty of crime and to menace the effective operation of government which is an essential precondition to the existence of all civil liberties." *Id.* at 714-15.

### 3. This Court Should Limit *Preston v. United States*.

To the extent that *Preston* suggests that every warrantless search of an automobile lawfully in police custody is illegal, it departs from the standard of reasonableness written into our Constitution. We respectfully urge this Court to clarify and limit *Preston v. United States*.

In striving to uphold reasonable searches, courts have been compelled to distinguish *Preston* in numerous and remarkable ways: (1) by the elapsed time between the seizure and the search, *Crawford v. Bannan*, 336 F.2d 505 (6th Cir. 1964), *cert. denied*, 381 U.S. 955 (1965); (2) by finding the searched vehicle to be an instrument of the crime, *Johnson v. State*, 238 Md. 528, 209 A.2d 765 (1965); (3) by the presence of the accused, though in custody, during the search of his automobile at a police station, *Arwine v. Bannan*, 346 F.2d 458 (6th Cir.), *cert. denied*, 382 U.S. 882 (1965); (4) because the search of the vehicle occurred at the scene of arrest, although hours after the accused had been jailed, *State v. Collins*, 270 Minn. 581, 132 N.W.2d 802 (1964); (5) because the

search was more properly related to the basis for arrest than in *Preston*; *State v. Fioravanti*, 46 N.J. 109, 215 A.2d 16 (1965), *cert. denied*, 384 U.S. 919 (1966); (6) because the arrest was made under conditions of bad weather, *State v. McCreary*, 142 N.W.2d 240 (S.D. 1966); or in a hostile neighborhood, *United States ex rel. Montgomery v. Wallack*, 255 F.Supp. 566 (S.D. N.Y. 1966).

On occasion, *Preston* simply has not been followed. *State v. Rowan*, 246 La. 38, 163 So.2d 87 (1964); *People v. Moschita*, 25 App. Div. 2d 686, 269 N.Y.S.2d 70 (1966); *People v. Morgan*, 21 App. Div. 2d 815, 251 N.Y.S.2d 505 (1964), *remanded on other grounds*, 15 N.Y.2d 914, 206 N.E.2d 656, 258 N.Y.S.2d 650 (1965).

Another response has been the development of the "continuous search doctrine." If police officers conduct a cursory examination of the accused's vehicle upon arrest, a subsequent search of greater scope and intensity constitutes part of a single "reasonable search process." *People v. Talbot*, 64 A.C. 751, 769, 414 P.2d 633 (1966). *Accord: Trotter v. Stephens*, 241 F.Supp. 33 (E.D. Ark. 1965); *State v. Fioravanti*, *supra*; *State v. Putnam*, 178 Neb. 445, 133 N.W.2d 605 (1965). *Cf. Price v. United States*, 348 F.2d 68 (D.C. Cir.), *cert. denied*, 382 U.S. 888 (1965); *Rodgers v. United States*, 246 F. Supp. 405 (E.D. Mo. 1965); *Johnson v. State*, 238 Md. 528, 209 A.2d 765 (1965). *Cf. also State v. Grunau*, 141 N.W.2d 815 (Minn. 1966); *People v. Jeffries*, 31 Ill.2d 597, 203 N.E.2d 398 (1964).

Specific disapproval of *Preston* has not been wanting. *Bowling v. United States*, 350 F.2d 1002, 1005 (D.C. Cir. 1965) (dissent); *State v. Bitz*, 404 P.2d 628, 634 (Idaho 1965) (dissent).

The efforts of federal and state courts alike to avoid the possible impact of *Preston* is evidence of the undesirable effects of that decision. Thus, the state and federal courts uncertain of the effect of *Preston*, have by tenuous reasoning created subtle distinctions to uphold otherwise reasonable searches. If this Court now construes *Preston* to exclude all warrantless searches and seizures "remote in time or place" to the arrest, its effect will be to hold unlawful those searches which, both in logic and reason as well as the purposes and values protected, are patently reasonable under the Fourth Amendment.

**B. The Search of a Vehicle Properly Seized and Impounded Pursuant to a Valid Forfeiture Provision Is Reasonable Under the Fourth Amendment.**

In *Preston v. United States*, 376 U.S. 364 (1964), this Court held that the search of a car at a police station after the defendant had been arrested and taken into custody was too remote in time and place to have been made as incidental to the arrest. Respondent makes no claim that the search of Cooper's automobile should be considered as incidental to his arrest. Thus, *Preston* is not applicable to the instant case.

*Cooper* may be further distinguished. In *Preston* the seizure of the suspect's automobile was unrelated to the grounds for arrest. *Preston* was arrested for vagrancy. In the case of vagrancy, there is no fruit of the crime nor is there any contraband associated with such a violation.<sup>23</sup> After being taken to the station the police searched the car and found masks, pillowslips and other articles which led to a confession of a plan to rob a bank. What was found there connected the suspects with the crime of which they were convicted, conspiracy to commit bank robbery. Clearly, the search was not related to the arrest. By contrast, the seizure of *Cooper's* automobile was integral with his arrest and in fact compelled by it. Arresting officers knew that *Cooper* was using the vehicle to transport heroin and they impounded his vehicle pursuant to a statutory mandate. California Health and Safety Code § 11611. *Cooper* suffered no separate and unnecessary invasion of privacy.

Perhaps *Cooper* differs most significantly from *Preston* in that here authorities acted under an ap-

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<sup>23</sup>An arrest for vagrancy is similar to an arrest for a traffic violation. There are no fruits of speeding or other traffic violations nor is there any contraband associated with such offense. Although an officer may arrest a suspect for a traffic violation, the search of the car cannot be justified on that ground, for it has no relation to the traffic violation and would not be incidental to an arrest therefor. This principle has been recognized by many courts. *Byrd v. State*, 80 So.2d 694 (Fla. 1955); *People v. Zeigler*, 358 Mich. 355, 100 N.W.2d 456 (1960); *United States v. Tate*, 209 F.Supp. 762 (D.Del. 1962); *People v. Mayo*, 19 Ill. 2d 136, 166 N.E.2d 440 (1960); *People v. Blodgett*, 46 Cal.2d 114, 293 P.2d 57 (1956); *People v. Moray*, 222 Cal.App.2d 743, 35 Cal.Rptr. 432 (1963); *Elliot v. State*, 173 Tenn. 203, 116 S.W.2d 1209 (1938).



plicable state forfeiture statute.<sup>24</sup> Searches and seizures of contraband and of vehicles and vessels transporting contraband have been historically distinguished from searches generally.

The reasonableness of a warrantless search of an automobile impounded pursuant to a similar federal statute<sup>25</sup> has been recognized in an impressive line of decisions rendered by the Circuit Courts of Appeals. Such searches were upheld prior to *Preston* by the Fifth Circuit, *Vaccaro v. United States*, 296 F.2d 500 (1961), *cert. denied*, 369 U.S. 890 (1962), and by the Tenth Circuit, *Sirimarco v. United States*, 315 F.2d 699, 701, *cert. denied*, 374 U.S. 807 (1963). Subsequent to the *Preston* decision, similar searches were upheld by the Ninth Circuit, *Burge v. United States*, 342 F.2d 408, *cert. denied*, 382 U.S. 829 (1965), by the Eighth Circuit, *Drummond v. United States*, 350 F.2d 983, 988 (1965), *cert. denied*, 384 U.S. 944 (1966), and by the Seventh Circuit, *United States v. Ziak*, 360 F.2d 850 (1966).

<sup>24</sup>It should be noted that respondent does not contend that the state forfeiture statute authorizes a search of the vehicle. The District Court of Appeal determined that the state statute did not authorize a search and that court's construction of its own state statute is controlling. *Albertson v. Mallard*, 345 U.S. 242 (1953); *United States v. Burnison*, 339 U.S. 87 (1950). Rather it is respondent's position that where a statute authorizes the seizure and forfeiture of a vehicle the later search of that vehicle cannot be said to be unreasonable within the meaning of the Fourth Amendment. The District Court of Appeal rejected this argument exclusively on federal constitutional grounds referring only to the Amendment and not to its state analogue, Article I, section 19 of the California Constitution.

<sup>25</sup>Title 49, United States Code, section 782, provides that any vessel, vehicle or aircraft used to transport contraband (narcotics, firearms or counterfeit obligations) shall be seized and forfeited.

In *Burge v. United States, supra*, the defendant used his car to transport and sell heroin, and was later arrested for violations of the narcotics law. At the time of his arrest the federal officers seized and impounded his car pursuant to the federal forfeiture statute. One week later, officers searched the vehicle and found marked money secreted in the headlight section of the automobile. In upholding the validity of the search the court held that where the officers who seized the car had probable cause for believing that it had been used for transporting contraband and the car was in the lawful custody of the United States from the time of seizure until the search, the search without a warrant of the seized car was not unreasonable within the meaning of the Fourth Amendment.

California state law requires any state peace officer upon making an arrest for a narcotics violation to seize any vehicle used to unlawfully transport any narcotic. California Health & Safety Code § 11611.<sup>26</sup> In the instant case the officers had probable cause for believing that Cooper's car had been used to transport

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<sup>26</sup>California Health and Safety Code section 11611 provides:

"Any peace officer of this State, upon making or attempting to make an arrest for a violation of this division, shall seize any vehicle used to unlawfully transport any narcotic or to facilitate the unlawful transportation of any narcotic, or in which any narcotic is unlawfully kept, deposited or concealed or which is used to facilitate the unlawful keeping, depositing or concealment of any narcotic, or in which any narcotic is unlawfully possessed by an occupant thereof, or which is used to facilitate the unlawful possession of a narcotic by an occupant thereof, and shall immediately deliver such vehicle to the Division of Narcotic Enforcement of the Department of Justice to be held as evidence until a forfeiture has been declared or a release ordered."

narcotics and thereafter seized the vehicle pursuant to the statutory mandate and kept the vehicle in lawful custody until the search.

A search made reasonable by the presence of the federal forfeiture provisions is no less reasonable where made in conjunction with California's forfeiture statutes. In each case, the officials seized the vehicle pursuant to an express statutory mandate giving the officers power to seize a vehicle because of its illicit use in the transportation of narcotics. In each case there is a minimal invasion of privacy since the vehicle searched already has been seized from the accused and is in police custody.

This is not an area where law enforcement officers may exercise unbridled discretion. The basic decision to invade one's privacy—by the seizure and impounding of his automobile—is made by the legislature, not the police. Under such facts and circumstances, a subsequent search of the seized vehicle does not constitute an unreasonable search and seizure within the meaning of the Fourth Amendment.

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### III

**THE QUESTION OF WHETHER PETITIONER WAS DENIED THE CONSTITUTIONAL RIGHT OF CONFRONTATION IS NEITHER PROPERLY BEFORE THIS COURT, NOR MERITORIOUS.**

Petitioner complains that he was denied his constitutional right of confrontation and cross-examination. He bases this on (1) Agent Lee's testimony that the

informant Green told him that "yes," he had the stuff after buying the heroin (R. 157), and (2) the officers' testimony "concerning every pertinent movement of the informer from his arrest to his delivery of heroin to Agent Lee" (Brief for the Petitioner 43). Since the prosecution did not call Green as a witness, petitioner claims he was denied the right of cross-examination inherent in the confrontation clause.

**A. The Question of Whether Petitioner Was Denied the Constitutional Right of Confrontation Guaranteed Him by the Sixth Amendment Is Not Properly Before This Court.**

In order to exercise orderly and fair certiorari jurisdiction over state court decisions which involve important constitutional questions, Congress and this Court have set forth definite procedural prerequisites of a very firm nature, which requirements the petitioning party must fulfill before this Court will entertain jurisdiction.

Generally speaking, these rules are as follows: (1) the petitioning party must have "seasonably raised [the federal questions] in accordance with the requirements of state law";<sup>27</sup> (2) the petitioning party must have raised the constitutional question with sufficient particularity to have apprised the state court of the problem involved;<sup>28</sup> and (3) petitioner

<sup>27</sup>*Edelman v. California*, 344 U.S. 357, 358 (1953); accord, *Louisville and Nashville Railway v. Woodford*, 234 U.S. 46, 51 (1913); *Hulbert v. City of Chicago*, 202 U.S. 275 (1906); *Parker v. Illinois*, 333 U.S. 571 (1947); *Pennsylvania R.R. v. Illinois Brick Co.*, 297 U.S. 447, 463 (1936); *Hartford Life Ins. Co. v. Johnson*, 249 U.S. 490, 493 (1918).

<sup>28</sup>*Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1896).



must have pursued the constitutional issue through to a decision thereon by the highest state court.<sup>29</sup>

Because certiorari is at all times discretionary,<sup>30</sup> where it becomes apparent that petitioner has failed to comply with these fundamental conditions precedent this Court should dismiss its writ of certiorari as having been improvidently granted.<sup>31</sup>

In the instant case, the so-called confrontation issue was never presented to or passed on by the "highest" state court because petitioner neglected to pose the constitutional issue until his petition for hearing in the California Supreme Court,<sup>32</sup> and that court de-

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<sup>29</sup>28 U.S.C. § 1257 provides: "Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows . . . (3) by writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution. . . ."

"It must affirmatively appear on the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided, by such state court." *Whitney v. California*, 274 U.S. 357, 360 (1927); accord, *Honeyman v. Hanan*, 300 U.S. 14, 18 (1937); *Lynch v. New York*, 293 U.S. 52, 54 (1934); *Durley v. Mayo*, 351 U.S. 277, 281 (1955).

<sup>30</sup>*Hammerstein v. Superior Court*, 341 U.S. 491, rehearing denied, 342 U.S. 843 (1951).

<sup>31</sup>"Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment." *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952); see also *Lynch v. New York*, 293 U.S. 52, 54-55 (1934); *Durley v. Mayo*, 351 U.S. 277, 281 (1956); *Newsom v. Smith*, 365 U.S. 604 (1961); and *Mishkin v. State of New York*, 383 U.S. 502, 512-514 (1966).

<sup>32</sup>The only objection at trial made by petitioner which had anything to do with the informant Green was a motion for dismissal on the basis of insufficient evidence. See R. 206-208. He did not pursue this issue on appeal nor did he raise any other related problems until his petition for hearing in the California Supreme Court. See Brief for the Petitioner 47, 48.

nied hearing the appeal without opinion.<sup>33</sup> The issue was never presented to the District Court of Appeal which was the "highest state court" for this purpose. Where the highest state court has discretionary review and declines to exercise its authority, the judgment of the intermediate court rather than the order of refusal by the higher court is the judgment reviewable under section 1257.<sup>34</sup>

Moreover, California adheres to the rule requiring an objection at trial before an issue involving the admissibility of evidence can be considered on appeal.<sup>35</sup> The sufficiency of this failure to object at the trial level as an independent and adequate state ground, particularly with reference to the confrontation clause, is well noted in this Court's decision in *Douglas v. Alabama*, 380 U.S. 415 (1965), the companion case to *Pointer v. Texas*, 380 U.S. 400 (1965). Therein, this Court stated, "In determining the sufficiency of objections we have applied the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appro-

<sup>33</sup>*People v. Cooper*, 1 Crim. 4233, California Supreme Court, July 21, 1965. See R. 276.

<sup>34</sup>*Sullivan v. Texas*, 207 U.S. 416 (1907); *American Ry. Exp. Co. v. Levee*, 263 U.S. 19, 20-21 (1923); *Hammerstien v. Superior Court*, 341 U.S. 491, 492 (1951); *Michigan Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 (1953); *Ellis v. Dixon*, 349 U.S. 458 (1954).

<sup>35</sup>*People v. Richardson*, 51 Cal.2d 445, 447, 334 P.2d 573, 575 (1959); *People v. Hyde*, 51 Cal.2d 152, 157, 331 P.2d 42, 44-45 (1958); *In re Lessard*, 62 Cal.2d 497, 503, 399 P.2d 39, 43 (1965). California follows the same rule with respect to the production of witnesses. *People v. Velis*, 172 Cal.App.2d 470, 473, 342 P.2d 392, 394-395 (1959).

priate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here." *Douglas v. Alabama, supra*, at 422.

Accordingly, this Court has consistently held that failure to present the issue in conformance with established state procedural requirements, such that the court below could not or did not consider the issue, furnishes independent and adequate state grounds for their decision, thereby precluding review here.<sup>36</sup>

Petitioner endeavors to obviate this fundamental defect by claiming that he was unaware the right existed until a time when the only remedial course open to him was a petition for hearing in the California Supreme Court.<sup>37</sup> However, *Pointer v. Texas, supra*, was decided by this Court on April 5, 1965, some seven weeks prior to the District Court of Appeal's decision in this case, and ten weeks previous to the time at which petitioner claims he actually became aware thereof.<sup>38</sup>

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<sup>36</sup>*Edelman v. California*, 344 U.S. 357 (1953); *Louisville and Nashville Railway v. Woodford*, 234 U.S. 46 (1913); *Hulbert v. City of Chicago*, 202 U.S. 275 (1906); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291 (1902); *Pennsylvania R.R. v. Illinois Brick Co.*, 297 U.S. 447 (1935); *Wolfe v. North Carolina*, 364 U.S. 177 (1960); *Hartford Life Ins. Co. v. Johnson*, 249 U.S. 490 (1918); *John v. Paullin*, 231 U.S. 583 (1913); *Stembridge v. Georgia*, 343 U.S. 541 (1952); *Newsom v. Smith*, 365 U.S. 604 (1961); *Durley v. Mayo*, 351 U.S. 277 (1956).

<sup>37</sup>See Brief for the Petitioner 49-50.

<sup>38</sup>The District Court of Appeal handed down its decision on May 24, 1965, and petitioner alleges that he did not become aware of *Pointer v. Texas* until June 15, 1965. See Brief for the Petitioner 49.

Petitioner's lack of awareness is no excuse. He should have filed with the lower court a supplemental brief on the issue or at the very least have made a timely petition for rehearing, both of which avenues were clearly open to him.<sup>39</sup> His failure to do so provides ample justification for this Court to decline review of the matter.

Aside from his failure to timely raise the issue, petitioner's argument that he is excused from complying with the above requirements because of the unforeseeable change in the applicable law is without merit. The authority upon which he relies only but recites the well known exception to the general rule requiring a timely raising of the constitutional question, where, such a position would have been futile under the law operative at that time, but which law was suddenly and unexpectedly changed prior to the time of final judgment.<sup>40</sup> However, this authority is not pertinent to the instant case. Petitioner cannot claim the unreasonable burden of clairvoyance with respect to the right established in *Pointer v. Texas*.

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<sup>39</sup>If *Pointer v. Texas* was crucial to petitioner's case because it profoundly altered the applicable law as much as petitioner now contends, then petitioner's argument that a petition for rehearing in the District Court of Appeal would have been futile (because that court followed a contrary rule), appears wholly illogical in light of the fact that *Pointer* was clearly binding upon that court by virtue of the precise holding therein, i.e., that the Sixth Amendment right of confrontation was binding upon the states. Such a contention is unjustly attributing gross incompetence to a most highly respected court.

<sup>40</sup>Petitioner relies on *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 312 (1930); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930); and *Great Northern Rwy. Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 348 (1932)./



In California, the right of confrontation was definitely established, known, and well recognized for many years prior to this Court's decision in *Pointer*.<sup>41</sup> The California standard was no less stringent than that adopted in *Pointer*, nor was it any less respected.<sup>42</sup> Thus, in so far as it promulgated hitherto

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<sup>41</sup>Article I, section 13, clause 8 of the California Constitution provides that in criminal cases, "The legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial."

Accordingly, in 1872, the California Legislature enacted such a provision. As amended in 1911, it reads as follows: "In a criminal action the defendant is entitled . . . (3) To produce witnesses in his behalf and to be confronted with the witnesses against him, in the presence of the Court, except that . . . where the testimony of a witness on the part of the people, who is unable to give security for his appearance, has been taken conditionally in the like manner in the presence of the defendant, who has, either in person or by counsel, cross-examined or had the opportunity to cross-examine the witness, the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the State. . . ." California Penal Code § 686. See e.g., *People v. Ashley*, 42 Cal.2d 246, 272, 267 P.2d 271, 287, cert. denied, 348 U.S. 900 (1954); *People v. Redston*, 139 Cal.App.2d 485, 293 P.2d 880, 885-87 (1956); *People v. Fisher*, 208 Cal.App.2d 78, 25 Cal. Rptr. 242 (1962); *People v. Kiihoa*, 53 Cal.2d 748, 752, 349 P.2d 673, 675 (1960); *People v. Hanz*, 170 Cal.App.2d 793, 799, 12 Cal. Rptr. 282, 285 (1961), cert. denied, 368 U.S. 969 (1962); *People v. Noone*, 132 Cal.App. 89, 22 P.2d 284 (1933); *People v. Barnett*, 77 Cal.App.2d 299, 175 P.2d 237 (1947); *People v. McKoy*, 193 Cal.App.2d 194, 13 Cal. Rptr. 809, cert. denied, 369 U.S. 824 (1961); *People v. Terry*, 180 Cal.App.2d 48, 52-53, 4 Cal. Rptr. 597, 600-603 (1960), cert. denied, 364 U.S. 941 (1961); *People v. Raffington*, 98 Cal.App.2d 455, 458, 220 P.2d 967, 970 (1950), cert. denied, 340 U.S. 912 (1951).

<sup>42</sup>Nor is *Pointer v. Texas*, *supra*, any stricter than the California rule because it requires an effective cross-examination, thus implying the necessity for counsel at the preliminary hearing. Under California law, the accused has the right to counsel at the preliminary hearing. See California Penal Code section 858 and *People v. Williams*, 124 Cal.App.2d 32, 268 P.2d 156 (1954).

unforeseeable legal rights, *Pointer* had absolutely no effect on California law. It only made constitutionally binding upon the California courts a rule which this same judiciary had already been adhering to for quite some time.

Apparently, it is petitioner's answer that the right "was only statutory."<sup>48</sup> Respondent perceives no merit in this distinction. Whether constitutional or statutory, it is the right's establishment and the recognition accorded it which should be determinative in deciding whether it could have been meaningfully asserted.

*Pointer v. Texas* does not begin to encompass as contended by petitioner, that the accused has the absolute right to confront an informer who did not testify at his trial, but who only participated in the unlawful transaction charged. This is not the law in any jurisdiction—nor for that matter should it be.

The pivotal question at this stage should be what the law was at the time he could have presented the issue. Petitioner cannot sidestep state procedural rules by now raising the issue on the basis of what he feels the law should be.

Thus, what he is seeking here, is for this Court to approve, as excusable, his clear failure to properly raise and present this issue on appeal below, so long as the issue can now be somehow imaginatively theorized to allegedly fall within the purview of a case occurring in the context that *Pointer v. Texas* did here.

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<sup>48</sup>Brief for the Petitioner 48.

Such a rule would reduce to a shambles any appellate court's present standards for review and would also encourage the most flagrant abuse of what standards did remain.

It is submitted, that had petitioner properly presented this issue to the courts below, there can be little doubt but that their decision would have fully satisfied the present standards of this Court.

Respondent therefore respectfully requests that this Court abstain from passing on the issue at this time. Such abstinence, until a time when the state court has had a fair opportunity to squarely meet the issue, will only make more respected whatever view this Court may have on the problem.

**B. Petitioner Was Not Denied the Right of Confrontation Guaranteed Him by the Sixth Amendment.**

The confrontation clause of the Sixth Amendment provides that, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." In the recent case of *Pointer v. Texas*, 380 U.S. 400 (1965), this Court interpreted that clause to mean that the prosecution may not introduce against the accused the preliminary hearing testimony of the victim (who was unavailable at trial) where the accused did not have a meaningful opportunity to cross-examine him. This Court then went on to hold that the Sixth Amendment right of confrontation was binding upon the states through the due process clause of the Fourteenth Amendment.

Petitioner has strained to construct his argument in such a fashion as to fall within the proscription of the above decision. Accordingly, he argues that the informant Green was a key witness against him because when the prosecution witnesses (the officers who observed the illegal sale by petitioner to Green) related Green's role in the unlawful transaction, they were reciting inadmissible hearsay assertions by Green. Thus the failure of the prosecution to call Green, as their own witness, denied him his Sixth Amendment right to confront the witnesses against him.

1. **There Was No Hearsay Evidence of Any Consequence Used Against Petitioner.**

Petitioner first alleges that he was denied his constitutional right of confrontation with respect to testimony of Agent Lee. Agent Lee testified on direct examination that it was he who transported the informant Green and Agent Armenta to the area of Newell's Market, there let them out, and shortly thereafter picked them back up (R. 156). He was then asked:

"Q. Did you observe any other persons at this time?

A. At that particular time? No, sir.

Q. And then following that, tell us what happened next?

A. *At that time I asked Mr. Green if he had the stuff, at which time he said yes and he handed me a brown paper packet.*

Q. And I will show you, for the record, People's Number 4, and ask you, sir, if you can



identify any of those objects for his Honor, the Court.

A. Yes, sir, I can." (R. 157) (Emphasis added).

Petitioner characterizes the italicized statement as prejudicial hearsay because it was an assertion by Green "that the man he perceived in the car was defendant."<sup>43</sup>

Respondent submits that such an assertion was definitely not manifested in the above statement and that it is incorrect and grossly unreasonable to contend that it was. The only reasonable interpretation of the statement is that Green was merely asserting that he then actually had the narcotics—nothing more.

Exactly how this statement was "crucial" to the prosecution's case,<sup>43</sup> respondent fails to understand—it appears de minimus at best. There was no dispute that Green did have the "stuff", or, going one step further, whether the "stuff" was actually heroin. Furthermore, while the testimony of Agent Lee, during which he volunteered Green's statement, may have technically been hearsay, any question of its admissibility was clearly waived by petitioner's failure to interpose an objection thereto.<sup>44</sup>

<sup>43</sup>Brief for the Petitioner 44.

<sup>43</sup>Brief for the Petitioner 42.

<sup>44</sup>"If evidence of this kind [hearsay] is admitted without objection, it is to be considered, and accorded its natural probative effect, as if it were in law admissible." *Spiller v. Atchison, T. & S. F. Ry. Co.*, 253 U.S. 117, 130 [citation omitted]; *Diaz v. United States*, 223 U.S. 442, 450 [citation omitted]; *Schlemmer v. Buffalo, Rochester & P. Ry. Co.*, 205 U.S. 189 [citation omitted]; *Dowling v. Jones*, 2 Cir., 67 F.2d 537, 539. The federal authorities are

Petitioner also errs when he characterizes Green's conduct in the transaction, as reflected in the observing officer's testimony, as hearsay evidence because it allegedly consisted of implied assertions by Green that petitioner had sold him the narcotics, and from which the trial court drew the inference that he (Green) truly believed "that the man he perceived in the car was petitioner." This position is untenable in both logic and fact.

Green's role in the transaction was not shown for the purpose of causing the trier of fact to draw inferences as to what Green did or did not believe—what he believed was immaterial.<sup>45</sup> The facts which established the prosecution's case were not hearsay assertions by Green,—but rather the circumstances surrounding the transaction from which Green returned with narcotics and without the marked money.

The relevant circumstances were as follows: Green was twice thoroughly searched before leaving the police station. He was then supplied with marked money. Thereafter, he was driven to a public telephone where he called petitioner and arranged for an immediate appointment at Newell's Market, where the proposed sale of narcotics would then be consummated. He was then driven to Newell's Market and let out of the car. From the moment he left the

unanimous on this point." *United States v. Rosenberg*, 195 F.2d 583, 596 (2d Cir.), cert. denied, 344 U.S. 838 (1952). See also *People v. Huber*, 225 Cal.App.2d 536, 544, 37 Cal. Rptr. 512, 517 (1964), cert. denied, 380 U.S. 981 (1965); *People v. Caruth*, 237 Cal.App.2d 401, 404, 47 Cal. Rptr. 29, 31 (1964).

<sup>45</sup>See MCCORMICK, EVIDENCE, § 229 (1954), and II WIGMORE, EVIDENCE, § 267 (3d ed. 1940).

car until he returned five minutes later he was under continuous observation. While at Newell's Market he contacted no one other than petitioner. Upon his return to the car, he immediately handed over to Agent Lee the bundle of heroin.

It was this evidence establishing that Green could have received the heroin from no other source than petitioner that situated Green as merely an indirect reflection of petitioner—in effect, only a conduit. Plainly the officers simply could not have meaningfully described the operative facts without necessarily relating the role of Green therein.<sup>46</sup>

Furthermore, in response to defense counsel's motion for a dismissal on the basis of insufficient evidence (R. 206-207), the trial judge's statement clearly demonstrates that he was relying not on what Green said or believed, but rather on the observing officers' testimony which related a chain of circumstantial evidence so tightly connected it made inescapable the conclusion that petitioner had made the unlawful sale.

"Actually, I see no reason, Mr. Moran, to disbelieve at this point the basic testimony of the

<sup>46</sup>Law enforcement stratagems of this type are routine in the investigation and detection of narcotics law violations. See, e.g., *Jackson v. United States*, 330 F.2d 679 (8th Cir.), cert. denied, 379 U.S. 855 (1964); *Byrth v. United States*, 327 F.2d 917 (8th Cir.), cert. denied, 377 U.S. 931 (1964).

Note also that given this factual context, the problem is usually only one of sufficiency, i.e., establishing conclusively that the decoy was continually under observation in order to negate any possibility he may have received the contraband from someone other than the accused. See e.g., *People v. Wilkins*, 178 Cal.App.2d 242, 2 Cal. Rptr. 908 (1960); *People v. Givens*, 191 Cal.App.2d 834, 838, 13 Cal. Rptr. 157 (1961), cert. denied, 368 U.S. 970 (1962); *People v. Basler*, 217 Cal.App.2d 389, 394-397, 31 Cal. Rptr. 884 (1963).

officers. I have no doubt that the defendant was out there. I have no doubt that Green was out there. I have no doubt that contact was made. The two bindles are here. Agent Lee says they were turned over to him by Mr. Green after the contact." R. 208.

Thus Green was nothing more than a vehicle utilized by the officers to reflect the unlawful activities of petitioner.

2. The Prosecution Was Under No Obligation to Call the Informant Green as Its Own Witness.

In the instant case, the identity of the informant was known to petitioner and he was readily available as a witness should petitioner have desired him as such. *Cf., Roviato v. United States*, 353 U.S. 53 (1957). Indeed, counsel for petitioner expressly stated, following completion of the prosecution's case, that he had been given the opportunity to talk to Green.

"Mr. Moran: Now if the Court please, and I have discussed this with Mr. Curtin [prosecutor], this Mr. Green will be available—he's being made available at my request for tomorrow morning. I would wonder if it would be inconvenient to take a recess until that time." R. 208.

Plainly, there was no refusal to identify, no suppression of evidence, or any other form of misconduct by the prosecution with respect to the informant Green.

Thus, without unnecessary elaboration, the factual context of this issue is simply that the prosecution elected to present certain witnesses, but not others



and among whom was the informant Green. Given just such a context, generally speaking, it is the uniformly followed rule that the prosecution has a free election in deciding whether or not to call the informant.<sup>47</sup> "Appellant must plead and prove his own case and is responsible for the production in court of witnesses necessary to do so."<sup>48</sup>

<sup>47</sup>See generally *Cenedella v. United States*, 224 F.2d 778, 783 (1st Cir.), cert. denied, 350 U.S. 901, (1955); *Warring v. United States*, 222 F.2d 906, 912 (4th Cir.), cert. denied, 350 U.S. 861 (1955); *United States v. Kabot*, 295 F.2d 848, 851 (2nd Cir. 1961), cert. denied, 369 U.S. 803 (1962); *Cohen v. United States*, 363 F.2d 321, 328 (5th Cir. 1966).

Re failure to call an informer: see *Eberhart v. United States*, 262 F.2d 421 (9th Cir. 1958); *Washington v. United States*, 258 F.2d 696 (D.C. Cir. 1958); *Williams v. United States*, 273 F.2d 781, 796 (9th Cir. 1958), cert. denied, 362 U.S. 951 (1960); *United States v. D'Angiolillo*, 340 F.2d 453, 455-456 (2nd Cir. 1965), cert. denied, 380 U.S. 955; *United States v. Repetti*, 364 F.2d 54, 55-56 (2nd Cir. 1966); *United States v. Holdday*, 319 F.2d 775, 776 (2nd Cir. 1963); *Diggs v. United States*, 352 F.2d 327 (5th Cir. 1965); *Müller v. Sigler*, 353 F.2d 424, 427-428 (8th Cir. 1965), cert. denied, 384 U.S. 980 (1966); *White v. United States*, 330 F.2d 811, 813-814 (8th Cir.), cert. denied, 379 U.S. 855 (1964); *United States v. White*, 344 F.2d 92, 93 (4th Cir. 1965); *Trent v. United States*, 284 F.2d 286 (D.C. Cir. 1960), cert. denied, 365 U.S. 889 (1961); *Richards v. United States*, 275 F.2d 655 (D.C. Cir.), cert. denied, 363 U.S. 815 (1960); *Washington v. United States*, 275 F.2d 687, 690 (5th Cir. 1960).

In California, see *People v. Wilkins*, 178 Cal.App.2d 242, 2 Cal. Rptr. 908 (1960); *People v. McShann*, 177 Cal.App.2d 195, 2 Cal. Rptr. 71 (1960); *People v. McCrackey*, 149 Cal.App.2d 630, 635, 309 P.2d 115, 118 (1957); *People v. Kihua*, 58 Cal.2d 748, 752, 349 P.2d 673, 675 (1960); *People v. Tuthill*, 31 Cal.2d 92, 187 P.2d 16 (1947), cert. denied, 335 U.S. 846 (1948); *People v. Castedy*, 194 Cal.App.2d 763, 15 Cal. Rptr. 413 (1961), cert. denied, 369 U.S. 825 (1962); *People v. Fontaine*, 237 Cal.App.2d 320, 46 Cal. Rptr. 855 (1965); *People v. Taylor*, 159 Cal.App.2d 752, 324 P.2d 715 (1958).

<sup>48</sup>*Thomas v. United States*, 158 F.2d 97, 99 (D.C. Cir. 1946), cert. denied, 331 U.S. 822 (1947); quoted with approval in *Ferrari v. United States*, 244 F.2d 132, 142 (9th Cir.), cert. denied, 355 U.S. 873 (1957).

The authority relied upon by petitioner (*United States v. Clarke*, 220 F.Supp. 905 (E.D. Pa. 1963); *United States v. Ramsey*, 220 F.Supp. 86 (E.D. Tenn. 1963); and the concurring opinion of Mr. Chief Justice Warren in *Lopez v. United States*, 373 U.S. 427, 444-45 (1963) is patently inapplicable to the instant case.

These decisions represent distinctly federal law in which the respective court's concern was over the administration of criminal justice in the federal courts<sup>49</sup>—and moreover, there is not the slightest mention in any of these decisions of a possible confrontation clause violation. The courts which have passed on a confrontation issue in this context have held there is no violation of that clause under these circumstances.<sup>50</sup>

Furthermore, in the cases cited by petitioner it is clear if not explicit that the determinative factor therein was that the accused's sole defense was one of entrapment and that it simply could not have been

<sup>49</sup>"Although the dissent assumes that this case and *On Lee* are in all respects the same, to me they are quite dissimilar constitutionally and from the viewpoint of what this Court should permit under its supervisory power over the administration of criminal justice in the federal courts." 373 U.S. 427, 441 (concurring opinion of Warren, C.J.). (Emphasis added). Accord, *United States v. Ramsey*, 220 F.Supp. at 86-88: "The issue with which the Court is confronted is whether federal trial courts possess the power to supervise federal law enforcement to the extent of requiring fair conduct from federal agents in furnishing evidence of crime. . . ."

<sup>50</sup>*Washington v. United States*, 275 F.2d 687, 690 (5th Cir. 1960); *Dear Check Quong v. United States*, 160 F.2d 251, 253 (D.C. Cir. 1947); and *Curtis v. River*, 123 F.2d 936 (D.C. Cir. 1941).

put forth without recourse to the absent witness.<sup>50a</sup> Indeed, petitioner now urges that he was prejudiced by Green's absence because cross-examination of Green would have permitted him the opportunity of establishing just such a defense.

Neither at trial nor in the District Court of Appeal did petitioner so much as hint at the possibility of an entrapment. His defense was solely one of mistaken identity. He flatly denied any knowledge of or relationship to the unlawful activities which took place at Newell's Market on December 21, 1961.

The established rule under both California and federal law is that the defense of entrapment must affirmatively be put in issue at the trial level before it can be raised on appeal.<sup>51</sup> In the instant case, it was not even presented on appeal and respondent accordingly contends that the conclusion of waiver is inescapable.

<sup>50a</sup>*United States v. Clarke* and *United States v. Ramsey*, *supra*.

<sup>51</sup>*People v. Tostado*, 217 Cal.App.2d 713, 719, 32 Cal. Rptr. 178, 182 (1963); *People v. Hawkins*, 210 Cal.App.2d 669, 671-72, 27 Cal. Rptr. 144, 146 (1962); *People v. Branch*, 119 Cal.App.2d 490, 495, 280 P.2d 27, 30 (1953); *People v. Cline*, 205 Cal.App.2d 309, 312, 23 Cal. Rptr. 916, 917 (1962); *People v. Valdes*, 188 Cal.App.2d 750, 10 Cal. Rptr. 664 (1961).

*Grant v. United States*, 291 F.2d 746, 748 (9th Cir. 1961), cert. denied, 368 U.S. 999 (1962); *Craig v. United States*, 337 F.2d 28, 29 (8th Cir. 1964), cert. denied, 380 U.S. 909 (1965); *United States v. Countryman*, 311 F.2d 189, 191 (2nd Cir. 1962); *Lucas v. United States*, 343 F.2d 1, 4 (8th Cir.), cert. denied, 382 U.S. 862 (1965); *Ramirez v. United States*, 294 F.2d 277 (9th Cir. 1961).



**CONCLUSION**

For the foregoing reasons, respondent respectfully urges that the judgment of conviction and sentence in petitioner's case be affirmed.

Dated, San Francisco, California,  
November 18, 1966.

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(Appendix Follows)



## **Appendix**

### **UNITED STATES CONSTITUTION**

#### **Fourth Amendment**

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

#### **Fifth Amendment**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

#### **Sixth Amendment**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of

the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

#### Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

#### UNITED STATES CODE

#### TITLE 28

28 U.S.C. §1257 (1964), 62 Stat. 929 (1949)

§1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or

laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States; or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

28 U.S.C. §2111 (1964), 63 Stat. 105 (1949)

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

#### Title 49

§782. Any vessel, vehicle, or aircraft which has been or is being used in violation of any provision of section 781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited: *Provided*, That no vessel, vehicle, or aircraft used by any person as a common carrier in the transaction of business as such common carrier shall be forfeited under the provisions of this chapter unless it shall appear that (1) in the case of a railway car or engine, the owner, or (2) in the case of any other such vessel, vehicle, or



aircraft, the owner or the master of such vessel or the owner or conductor, driver, pilot, or other person in charge of such vehicle or aircraft was at the time of the alleged illegal act a consenting party or privy thereto: *Provided further*, That no vessel, vehicle, or aircraft shall be forfeited under the provisions of this chapter by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such vessel, vehicle, or aircraft was unlawfully in the possession of a person who acquired possession thereof in violation of the criminal laws of the United States, or of any State.

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#### CALIFORNIA CONSTITUTION

##### Article I, §13.

§13. Criminal cases; speedy and public trial; process for witnesses; appearance and defense; counsel; double jeopardy; self-incrimination; due process; failure to explain or deny; depositions.

In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of



law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial. (Amended Nov. 6, 1934.)

#### Article I, §19

§19. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue, but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

#### Article VI, §4½

Sec. 4½. No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a

miscarriage of justice. (Added Oct. 10, 1911; amended Nov. 3, 1914.)

#### CALIFORNIA HEALTH AND SAFETY CODE

§11611. Seizure and delivery to state division. Any peace officer of this State, upon making or attempting to make an arrest for violation of this division, shall seize any vehicle used to unlawfully transport or to facilitate the unlawful transportation of any narcotic, or in which any narcotic is unlawfully kept, deposited or concealed or which is used to facilitate the unlawful keeping, depositing, or concealment of any narcotic, or in which any narcotic is unlawfully possessed by an occupant thereof, or which is used to facilitate the unlawful possession of a narcotic by an occupant thereof, and shall immediately deliver such vehicle to the Division of Narcotic Enforcement of the Department of Justice to be held as evidence until a forfeiture has been declared or a release ordered. (Stats. 1939, c. 60, p. 767, §11611, as amended Stats. 1940, 1st Ex. Sess., c. 9, p. 23, §34; Stats. 1949, c. 1475, p. 2570, §22; Stats. 1955, c. 1209, p. 2224, §2.)

## CALIFORNIA PENAL CODE

§ 686. Defendant's rights; speedy and public trial; counsel; production of witnesses; confronting adverse witnesses; exception.

In a criminal action the defendant is entitled:

1. To a speedy and public trial.
2. To be allowed counsel as in civil actions, or to appear and defend in person and with counsel.
3. To produce witnesses on his behalf and to be confronted with the witnesses against him, in the presence of the court, except that where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness; or where the testimony of a witness on the part of the people, who is unable to give security for his appearance, has been taken conditionally in the like manner in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane, or can not with due diligence be found within the state; and except also that in the case of offenses hereafter committed the testimony on behalf of the people or the defendant of a witness deceased, insane, out of jurisdiction, or who can not, with due diligence, be found within the state, given on a former trial of the

action in the presence of the defendant who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, may be admitted. (Enacted 1872. As amended Stats. 1911, c. 187, p. 364, § 1.)

§ 858. Informing defendant of charge and right to counsel; minors; members of armed forces.

When the defendant is brought before the magistrate upon an arrest, either with or without warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings. If it appears that the defendant may be a minor, the magistrate shall ascertain whether such is the case, and if the magistrate concludes that it is probable that the defendant is a minor, and unless the defendant is a member of the armed forces of the United States and the offense charged is a misdemeanor, he shall immediately either notify the parent or guardian of the minor, by telephone, telegram, or messenger, of the arrest, or appoint counsel to represent the minor. (As amended Stats. 1959, c. 2185, p. 5308, § 1; Stats. 1961, c. 1449, p. 3296, § 1.)

§ 995. Cases in which indictment or information must be set aside.

The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:



If it be an indictment:

1. Where it is not found, endorsed, and presented as prescribed in this code.
2. That the defendant has been indicted without reasonable or probable cause.

If it be an information:

1. That before the filing thereof the defendant had not been legally committed by a magistrate.
2. That the defendant had been committed without reasonable or probable cause.

[Enacted 1872. As amended Code Am. 1880, c. 118, p. 43, § 1; Stats. 1911, c. 256, p. 435, § 1; Stats. 1927, c. 854, p. 1756, § 1; Stats. 1939, c. 457, p. 1806, § 1; Stats. 1949, c. 1311, p. 2298, § 1.]

§ 999a. Writ of prohibition; time for filing petition; grounds; service; time for issuance of alternative writ.

A petition for a writ of prohibition, predicated upon the ground that the indictment was found without reasonable or probable cause or that the defendant had been committed on an information without reasonable or probable cause, must be filed in the appellate court within 15 days after a motion made under Section 995 of this code to set aside an indictment on the ground that the defendant has been indicted without reasonable or probable cause or that the defendant had been committed on an information without reasonable or probable cause, has been denied by the trial court. A copy of such petition shall be served upon

the district attorney of the county in which the indictment is retained or the information is filed. The alternative writ shall not issue until five days after the service of notice upon the district attorney and until he has had an opportunity to appear before the appellate court and to indicate to the court the particulars in which the evidence is sufficient to sustain the indictment or commitment. [Added Stats. 1949, c. 1311, p. 229q, § 2, as amended Stats. 1953, c. 614, p. 1861, § 1.]



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**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1966**

**No. 103**

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**JOE NATHAN COOPER,**

*Petitioner,*

*vs.*

**CALIFORNIA,**

*Respondent.*

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**ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF CALIFORNIA**

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**REPLY BRIEF FOR THE PETITIONER**

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**I.**

**The Fourth Amendment, No Less Than Any Other Command of the United States Constitution, Must Be Enforced by the Rule of Reversal.**

The crucial question before the Court is whether the Fourth Amendment is going to be enforced by the same rule of reversal that enforces other commands of the United States Constitution or eviscerated by a harmless error rule.

Even in cases in which the accused's guilt is clearly established by legal evidence, as it is not in this case, the

rule of reversal applies to prevent police and prosecutors from obtaining and using other forms of unconstitutional evidence such as coerced confessions, *e.g.*, *Haynes v. Washington*, 373 U.S. 503, 518-519 (1963), statements obtained by custodial police interrogation that are not preceded by warning and waiver, *e.g.*, *Miranda v. Arizona*, — U.S. — (1966), and perjured testimony knowingly used. *Coggins v. O'Brien*, 188 F.2d 130, 139 (1st Cir. 1951) (concurring opinion of Magruder, J.); *cf. Napue v. Illinois*, 360 U.S. 264, 269 (1959). The rule of reversal also prevents police and prosecutors from obtaining convictions by violating other constitutional requirements though the evidence of guilt otherwise may be untainted. *E.g.*, *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *White v. Maryland*, 373 U.S. 59, 60 (1963); *Glasser v. United States*, 315 U.S. 60, 76 (1942) (counsel); *Stromberg v. California*, 283 U.S. 359, 368 (1931) (first amendment); *Williams v. California*, 317 U.S. 287, 292 (1942) (full faith and credit); *Smith v. United States*, 360 U.S. 1, 9 (1959) (indictment); *Patton v. United States*, 281 U.S. 276, 292 (1930) (jury trial); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (impartial judge); *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963) (prejudicial pretrial publicity); *Bollenbach v. United States*, 326 U.S. 607, 615 (1946) (unconstitutional presumption).

Respondent asks this Court to create a special exception from this rule of reversal for cases involving evidence seized in violation of the Fourth Amendment and to impose the special burden upon any accused asserting his Fourth Amendment rights of establishing, not simply a reasonable possibility that the unconstitutional evidence might have contributed to his conviction, *e.g.*, *Fahy v. Connecticut*, 375 U.S. 85 (1963), but a reasonable probability that the result would have been in his favor if the illegal

evidence had not been admitted. *People v. Watson*, 46 Cal.2d 818, 836-837, 299 P.2d 243 (1956). (Resp. Br. 72-78.)

Respondent's contentions have no merit and should be squarely and expressly rejected by this Court.

A. RESPONDENT'S CONTENTIONS ARE INCOMPATIBLE WITH MAPP V. OHIO, WONG SUN V. UNITED STATES, AND MIRANDA V. ARIZONA.

1. Respondent's contention that persons asserting their Fourth Amendment rights should bear a special burden of establishing the prejudicial effect of illegally seized evidence is incompatible with the principle of *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) that "Fourth Amendment rights cannot be subjected to special conditions that are not imposed on any other 'basic' constitutional right."

2. Respondent's contention that the coerced confession cases are in a class by themselves because coerced confessions are "inherently prejudicial" (Resp. Br. 26, 24-29) is incompatible with *Miranda v. Arizona*, — U.S. — (1966) which establishes that "no distinction can be drawn between . . . confessions and 'admissions' . . . [or] between inculpatory statements and statements alleged to be merely 'exculpatory'," — U.S. at —, and that in all such cases "the existence of independent corroborating evidence produced at trial is, of course, irrelevant . . ." — U.S. at — n. 52. Cf. also *Haynes v. Washington*, 373 U.S. 503 (1963).

3. Respondent's contention that illegally seized evidence cases are not controlled by the rule of reversal of the coerced confession cases is incompatible with *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) which establishes that the use of



such evidence is "tantamount to coerced testimony" and with *Wong Sun v. United States*, 371 U.S. 471, 485-486 (1963) which establishes that no rational basis exists for distinguishing unconstitutionally obtained real evidence from unconstitutionally obtained testimonial evidence.

**B. NO PRECEDENT EXISTS IN THIS COURT FOR DISMISSING VIOLATIONS OF THE UNITED STATES CONSTITUTION AS HARMLESS.**

Respondent's contention (Resp. Br. 16-24) that precedent in this Court permits violations of the United States Constitution to be disregarded as only harmless is not supported by the cases-cited:

1. *Motes v. United States*, 178 U.S. 458 (1899) held that: (a) the use at trial of the preliminary hearing testimony of a co-conspirator whom the prosecution had negligently allowed to escape from jail violated the defendants' right of confrontation, 178 U.S. at 467-474, (b) the error required a new trial for all defendants but one. As to him the error was held harmless because he confessed at the trial. This second holding is both inapposite and obsolete. It is inapposite because the conviction was only obtained after the defendant "stated under oath that he was guilty of the charge preferred against him", 178 U.S. at 476, i.e., in effect on a plea rather than a trial of guilt. It is obsolete because it is inconsistent with the many cases since 1899 that enforce the United States Constitution by a rule of reversal (see Petr's. Op. Br. 25-31) and with the modern rule that a confession following a violation of the Constitution may itself be a poisoned fruit of that violation. See *Fahy v. Connecticut*, 375 U.S. 85, 90-91 (1963); *Wong Sun v. United States*, 371 U.S. 471, 484-488 (1963).

2. *Snyder v. Massachusetts*, 291 U.S. 97 (1934) held that no violation of the United States Constitution occurred when, outside defendant's presence but in the presence of his counsel, the jury was shown a view of the gasoline station where the crime occurred. The Court held that the Fourteenth Amendment does not require "that he must be present every second or minute or even hour of the trial" let alone at a view which historically was "something separate from a trial in court." 291 U.S. at 116-118. A "word of criticism" was spoken to the trial judge because his statement "that one of the three pumps was not there at the homicide goes beyond the bounds of explanation appropriate for showers," 291 U.S. at 118, but the Constitution was not violated by that statement because the defendant not only failed to object but "gave assent by acquiescence" to the same statement later in the trial. The *Snyder* case gave a limited permission to the states to conduct strictly governed views according to established local rules.<sup>1</sup> Cf. *Ker v. California*, 374 U.S. 23, 34 (1963). Clearly the case does not stand for the proposition that an abuse of that permission or any other violation of the Constitution can be washed away as harmless.

3. *Johnson v. United States*, 318 U.S. 189, 299 (1943) held that "petitioner expressly waived any objection to the prosecutor's comment [on his claim of privilege] by withdrawing his exception to it and by acquiescing in the treatment of the matter by the court." Waiver cases such as

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<sup>1</sup>For purposes of the present case, petitioner assumes without conceding that the *Snyder* case states a viable principle. Compare *Twining v. New Jersey*, 211 U.S. 78 (1908), with *Malloy v. Hogan*, 378 U.S. 1 (1964) and *Griffin v. California*, 380 U.S. 609 (1965) and see, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, — U.S. — (1966); *Pointer v. Texas*, 380 U.S. 400 (1965).

the *Johnson* case contradict rather than support respondent because they confirm that the Constitution must be enforced unless the individual whose rights have been violated consents to nonenforcement. Such cases by no means allow appellate courts to take away those rights without the accused's consent or on the basis of speculation whether prejudice resulted from the violation.

4. *Fahy v. Connecticut*, 375 U.S. 85 (1963) does not support respondent because the Court expressly reserved the question whether the evidentiary use of unconstitutionally seized evidence could ever be dismissed as harmless and applied an interim "reasonable possibility" test to reverse a conviction, not to affirm one. Unlike an affirmance that becomes a precedent for future violations of constitutionally protected rights, the reversal in the *Fahy* case was a warning that Fourth Amendment rights deserved, at the very least, the interim protection of a strict test of appellate review. *Stoner v. California*, 376 U.S. 483 (1964) is distinguishable for the same reason.

#### C. *LINKLETTER V. WALKER* CONTRADICTS AND DOES NOT SUPPORT RESPONDENT'S CONTENTIONS.

In *Linkletter v. Walker*, 381 U.S. 618 (1965), a case in which the defendant collaterally attacked his state conviction in a federal habeas corpus proceeding, this Court held that the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643 (1961) did not apply retroactively to upset judgments that had become final before *Mapp* was decided.

The State of California does not cite *Linkletter* for either its specific holding, or for the more general proposition that some rules of constitutional law are not applied retroactively, or for the crucial considerations of the deci-

sion. Those considerations, each of which was essential to the decision, were that the Court would not apply *Mapp v. Ohio* retroactively in cases: (1) in which a final judgment had been obtained and a hearing would be required on the excludability of reliable and relevant evidence, (2) in which the evidence was admissible under controlling decisions of this Court under the Fourth Amendment, (3) in which there was no impairment of "the very integrity of the fact finding process," 381 U.S. at 639, and (4) in which the trial otherwise complied with the Fourteenth Amendment. Rather, by a tortuous process of reasoning, the state contends that because the Court refused to apply *Mapp* retroactively, the Court should also uphold any conviction obtained at a "fair trial" (Resp. Br. 32) even though unconstitutionally obtained evidence is admitted into evidence at the trial, unless the accused can convince the appellate court that without such evidence he probably would not have been convicted (Resp. Br. 30-32, 72-75). However, the state's argument recognizes one exception: If the unconstitutionally obtained evidence is a coerced confession, the conviction must be reversed, of course, because as we all know, coerced confessions are "inherently prejudicial" while illegally seized real evidence is not.

The state's argument is illogical, is not supported by the coerced confession cases<sup>2</sup> and is made possible only by its ignoring the basic issues involved in *Linkletter* and the crucial elements of the holding in that case:

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<sup>2</sup> E.g., *Haynes v. Washington*, 373 U.S. 503 (1963); cf. *Miranda v. Arizona*, 384 U.S. 436 at n. 52.



1. *The element of finality is absent from this case.*

The Court in *Linkletter* was concerned about upsetting final judgments based on relevant and reliable evidence and imposing the burden on the judicial system of holding hearings on the excludability of such evidence. It was not concerned with preserving illegality, already established as such after a hearing, in judgments not yet final, as respondent would have the Court act here.

2. *The deterrent purpose of the exclusionary rule was not undercut in Linkletter, whereas it would be undercut severely by a rule that allows violations to be disregarded as only harmless error.*

The Court's statement in *Linkletter* that "the misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved" reflects its concern with preserving the deterrent function of the exclusionary rule in cases where it is most needed, such as this case, to deter police and prosecutors from ignoring the constitutional rights of persons suspected of crime.

In attempting to tie *Linkletter* to the instant case, respondent reveals a fundamental misunderstanding of this Court's role in developing principles to accommodate responsible law enforcement and protection of the constitutional rights of individuals. The police conduct in pre-*Mapp* cases was not approved in *Linkletter*, but was treated as a bygone that could not be remedied. In cases not involving the elements of *Linkletter*, this Court has not hesitated to enforce the Constitution with a rule that will protect constitutional rights, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Griffin v. Illinois*, 351 U.S.

12 (1956); *Miranda v. Arizona*, — U.S. — (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961) and it should not hesitate to do so in the instant case. Although the rule of reversal is necessary in all 50 states, if California's progressive and enlightened law enforcement officials and judges respect constitutional rights they will have no ground to feel the insults and affronts that respondent claims for them. (Resp. Br. 62.) A state such as California that has been in the vanguard of the states that accept the decisions of this Court will not be affronted by a rule that will not affect its officials if they respect the Constitution. California should willingly accept a rule that will encourage other states to act with the solicitude for constitutional rights that California says it has.

3. *The state has no justifiable reliance on earlier decisions of this Court to protect in this case.*

In *Linkletter*, as in *Tehan v. Shott*, 382 U.S. 406 (1966) and *Johnson v. New Jersey*, — U.S. — (1966), the fact that the states had relied on an old rule announced by the Court (e.g., *Wolf v. Colorado*, 338 U.S. 25 (1949)), was crucial to the decision. There is no such reliance interest in this case: For example, *Napue v. Illinois*, 360 U.S. 264, 269 (1959) made clear that this Court would strictly review a state's claim that its violation of the Constitution caused no harm to a defendant, and *Fahy v. Connecticut*, 375 U.S. 85 (1963) not only reversed a conviction despite such a claim but gave fair notice to the states that the validity of their harmless error rules was an open question. Nor can the state claim any reliance interest contrary to *Preston v. United States*, 376 U.S. 364 (1964). The *Preston* case changed the erroneous assumptions of some California courts that searches of impounded cars were

lawful despite the absence of a warrant or the incidence of an arrest (see R. 267-268) but no permission had been extended to the states to indulge in those assumptions, compare *Wolf v. Colorado, supra*, and they were far from universally followed. *E.g., People v. Garrison*, 189 Cal. App.2d 549, 552-556, 11 Cal. Rptr. 398 (1961); *Rent v. United States*, 209 F.2d 893, 896-899 (5th Cir. 1954).

4. *Even if the state's Linkletter argument were otherwise valid, it does not apply in this case because the unconstitutional evidence used against defendant, although highly relevant, was not reliable.*

The illegally seized paper was "highly relevant," as the Attorney General argued and conceded in the District Court of Appeal (R. 254) and was of crucial importance to a weak case (see Petr's. Op. Br. 14-18). It was not reliable evidence, however, and the fact finding process that allowed the prosecutor to have a damaging inference drawn from the police-controlled paper without supporting the inference with testimony or any scientific testing did not have the integrity required by *Linkletter*. (Petr's. Op. Br. 20-21.) See *People v. Hall*, 62 Cal.2d 104, 112 n. 8, 41 Cal. Rptr. 284, 396 P.2d 700 (1964).<sup>3</sup>

<sup>3</sup> In the *Hall* case, the California Supreme Court reversed a defendant's conviction of murder because the evidence was insufficient and stated that "Even if we could conclude that the meager evidence presented was sufficient, we might be compelled to reverse the judgment on the ground that the police disabled the prosecution from affording defendant a fair trial. The police kept him in custody for four days, denied his request for counsel, and failed to make tests that might have been probative of innocence or guilt. Whether or not due process requires a reasonably complete investigation of a crime, it is doubtful that a conviction can be upheld when an inadequate investigation has produced limited evidence and the police have rendered the defendant powerless to provide exculpatory evidence himself." 62 Cal.2d at 112 n. 8.

**D. THE APPLICATION OF A STATE'S HARMLESS ERROR RULE TO DISMISS VIOLATIONS OF THE UNITED STATES CONSTITUTION IS NOT AN ADEQUATE AND INDEPENDENT STATE GROUND OF DECISION THAT WILL PRECLUDE REVIEW EITHER BY THIS COURT OR A FEDERAL COURT IN HABEAS CORPUS PROCEEDINGS.**

Respondent concedes that the validity of a state's harmless error standard "raises a federal question" but contends that "the correctness of the application of that state standard . . . is not a federal question at all and is indeed an adequate and independent state ground of decision" that precludes review both by this Court and a federal court in habeas corpus proceedings. (Resp. Br. 81, 79-88.)

Respondent's contentions are clearly erroneous: Since *Martin v. Hunter's Lessee*, 1 Wheat. (14 U.S.) 304, 345-46 (1816), this Court's jurisdiction to review state court judgments has been essential to prevent erosion of the Constitution by "jarring and discordant judgments" of state judges. When such a judgment, even though it is based on "untenable construction more than the unconstitutional statutes," is challenged on constitutional grounds, an opportunity for this Court to review the challenge must be kept open since "to hold otherwise would open an easy method of avoiding the jurisdiction of this court." *Terre Haute & I.R.R. v. Indianapolis ex rel. Ketcham*, 194 U.S. 579, 589 (1904); see *Henry v. Mississippi*, 379 U.S. 443, 446-449 (1965); *O'Connor v. Ohio*, — U.S. — (35 L.W. 3174, Nov. 14, 1966). See also the coerced confession cases. E.g., *Payne v. Arkansas*, 356 U.S. 560 (1958); *Haynes v. Washington*, 373 U.S. 503 (1963). An opportunity for independent review in federal habeas corpus proceedings must be kept open also to protect from erosion the con-



stitutional rights of state claimants who have not deliberately bypassed state procedures. *Fay v. Noia*, 372 U.S. 391 (1963). The validity of a state's application of its harmless error rule, in particular, has been expressly held to be a federal question. *E.g.*, *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Fahy v. Connecticut*, 375 U.S. 85 (1963). To overrule the *Napue* and *Fahy* cases would not only circumvent the foregoing other principles of judicial review, starting with *Martin v. Hunter's Lessee*, *supra*, but would be particularly inappropriate in this case because an essential ingredient of the independent state ground doctrine is missing, namely the consistency of the state ground with prior state decisions. *E.g.*, *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 454-458 (1958). As Appendix B to petitioner's opening brief demonstrates, the notion that California's harmless error rule excuses violations of the United States Constitution is nothing more than a recent aberration that is not supported by the history, purpose, and prior California interpretations of that rule.

The enormous burden of review that the harmless error rule would impose upon this Court and the federal courts in habeas corpus proceedings cannot be avoided by the adequate and independent state ground doctrine. It can be avoided by enforcing the Fourth Amendment with the same rule of reversal that enforces the other commands of the United States Constitution.

## II.

**The Fourth Amendment Does Not Permit Searches and Seizures That Are Made Without Warrants, or Are Not Incident to an Arrest, or Are Made in the Absence of Exceptional Circumstances Such as the Threatened Destruction or Removal of Evidence or Contraband. Respondent's Contentions to the Contrary Have No Merit.**

Respondent (at Resp. Br. 96-110) advances the notion that searches and seizures such as the one that occurred in this case may be upheld as reasonable even though there was time for the state to obtain a search warrant but no warrant was obtained. This assertion is made in the face of the growing concern over searches that police and prosecutors attempt to justify as "incident" to a lawful arrest<sup>4</sup> and despite the absence of a moving automobile carrying contraband, *Carroll v. United States*, 267 U.S. 132 (1925), or "exceptional circumstances" such as the threatened removal or destruction of evidence or contraband. *Johnson v. United States*, 333 U.S. 10, 14-15 (1948); *Preston v. United States*, 376 U.S. 364 (1964).

**A. THE STATE'S POSITION IS NOT SUPPORTED BY PRECEDENT.**

The State's argument is founded upon a profound misunderstanding of the Fourth Amendment, which provides:

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<sup>4</sup> In *Wong Sun v. United States*, 371 U.S. 471, 480 n. 8 (1963), the Court stated that "Our discussion implies no view whether a search warrant should be obtained where a search is conducted incident to a valid arrest" and thereby left no doubt that the question is an open one. See *Johnson v. United States*, 333 U.S. 10 (1948); *Beck v. Ohio*, 379 U.S. 89, 91 (1964). For suggestions of appropriate limits, see Maguire, *Evidence of Guilt* 192-193 (1959), and for criticism of California cases, see Manwaring, *California and the Fourth Amendment*, 16 Stan. L. Rev. 318, 336-346 (1964).

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It is true that in certain circumstances searches can be made without a warrant, but these limited exceptions do not support the state's assertions here.

The requirement of a warrant unless such "exceptional circumstances" exist is so compelling that not even a state's lease-forfeiture statute will validate a landlord's consent to search his tenant's room, *Chapman v. United States*, 365 U.S. 610 (1961), and not even the government's control over an employee's desk will permit it to search that desk for personal papers without a warrant and without the employee's consent. *United States v. Blok*, 188 F. 2d 1019 (D.C. Cir. 1951). Even respondent's lead-off case, *Carroll v. United States*, *supra*, does not support its contentions, for there the Court made clear that "in cases where the securing of a warrant is reasonably practicable, it must be used." 267 U.S. at 156.

The state suggests that there was little impairment of defendant's right of privacy in this case since police commonly inventory the contents of impounded cars and, further, that since the car and its contents were in the possession of the police, there was no invasion of privacy at all. To support this curious argument the state attempts to compare defendant's car to a murderer's rifle or a burglar's sack. All of these arguments, however, would apply to a

police search of an arrestee's home a week following his arrest at his home. The police might suggest that in that case an "inventory" was proper to protect the homeowner, the police, and the watchman guarding the house. Given the right to inventory the home, the right to seize evidentiary material and to use it at trial would follow as of course. Since the police could have searched the home at the time of the arrest, a subsequent search would impair only slightly the defendant's right of privacy. Finally, if a defendant were suspected of using his home to prepare drugs for sale, for example, the home would fall into the category of the burglar's sack or murderer's rifle as "instrumentalities of the crime."

Such a watered-down version of the Fourth Amendment is not the law, however, *e.g.*, *Agnello v. United States*, 269 U.S. 20, 33 (1925) ("belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search without a warrant") nor is it the law for impounded cars. Each of the arguments suggested by respondent has been foreclosed by *Preston v. United States*, 376 U.S. 364 (1964).

**B. PRECEDENT AND REASON REQUIRE THAT THIS WARRANT-LESS SEARCH BE DECLARED ILLEGAL.**

Implicitly recognizing that *Preston* is foursquare against it, respondent argues that if *Preston* means what it says, state and lower federal courts will refuse to follow it. (Resp. Br. 104-106.) Apart from the fact that this is a surprising assertion to be found in a brief in which the State bristles at any suggestion that police, prosecutors and lower court judges cannot always be relied upon to support an accused's Fourth Amendment rights (see Resp. Br. 66),



the point is without merit. The cases cited below,<sup>5</sup> in addition to the instant case, have followed *Preston*; and there is no indication that law enforcement is foundering in these jurisdictions.

(The instant case and *Preston* are perfect examples of cases in which there is no justification for refusing to seek a search warrant. When an automobile is impounded there is no need for speed in searching, no fear of losing control of evidence or contraband known or supposed to be in the car. The fact that an arrestee's privacy may have been invaded at an earlier date when "exceptional circumstances" may have warranted an intrusion certainly cannot justify a subsequent invasion when the only reason for refusing or failing to obtain a search warrant would be that the police had no probable cause to believe that items subject to seizure were in the car. That reason for a warrantless search points up the fact that this case is not like the one mentioned by Chief Justice Vinson, dissenting in *Trupiano v. United States*, 334 U.S. 699, 714 (1948). If the police have probable cause for a search, there is no reason not to get a warrant. If they do not have probable cause, any search will be an unjustifiable expedition into private papers and effects and a blatant violation of Fourth Amendment fundamentals. *Entick v. Carrington*, 19 Howell State Trial 1029 (1765), *Boyd v. United States*, 115 U.S. 616 (1886), *Weeks v. United States*, 232 U.S. 383 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961).

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<sup>5</sup> See following *Preston*, e.g., *State v. Edmondson*, 379 S.W. 2d 486 (Mo. 1964), (paper under floorboard); *United States v. Cain*, 332 F.2d 999 (6th Cir. 1964) (bags of money in car); *State v. Riggins*, 64 Wash. 2d 881, 395 P.2d 85 (1964) (revolvers under dash).

Furthermore, precedent and sound policy support a requirement that police obtain a search warrant in situations such as presented by this case and *Preston*. At least since *Schneider v. Irvington*, 308 U.S. 147 (1939) this court has held that a state may not deny or suppress First Amendment rights in the exercise of its police powers for lawful purposes if those lawful purposes can be accomplished in some other, less restrictive, manner. See, e.g., *Shelton v. Tucker*, 364 U.S. 479 (1960); *NAACP v. Button*, 371 U.S. 415 (1963); and *Gibson v. Florida Investigating Comm.*, 372 U.S. 539 (1963). The consideration for the privacy and integrity of individuals expressed in the Fourth Amendment requires the same approach to be taken in determining when a warrant must be obtained.

The state argues (Resp. Br. 101), quite irresponsibly, that requiring a warrant in the instant case would be a terrible imposition.

"Were this Court to deny enforcement officials the right to gather such evidence from an accused in lawful custody, a necessary weapon in the arsenal of detection would be severely impaired. In recent years this Court has announced constitutional principles that necessarily diminish the use of interrogation and, at the same time, encourage police investigation. *Miranda v. Arizona*, 384 U.S. 436, 477-81 (1966); *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964). As a practical matter, this Court cannot possibly insist that enforcement officials rely upon independent investigation and at the same time deny them an integral aspect of such investigations."

"In the instant case there was an offense committed by the petitioner, sale of narcotics, the police properly

seized an instrumentality of that crime, the automobile, and thereafter examined the instrumentality for the fruits of that crime. It is unreasonable and illogical to say that when officers lawfully come into the possession of an instrumentality of the crime that they may not later lawfully examine it, unless they secure a search warrant."

However, the question presented is not whether the State could have searched defendant's car; the question is whether they had to obtain a warrant before doing so. Defendant insists that the answer must be "Yes."

Obviously there will be times when police officers reasonably arrest a person in an automobile and there is not time to obtain either an arrest warrant or a search warrant. But instead of assuming away the problems as the state does in the second quote above, assume the person is innocent of any crime but is guilty of belonging to some despised minority, as the contents of his automobile will show. If the police did not search his automobile at the time of arrest, assuming without conceding they could legally have done so, it is imperative that the independent judgment of a magistrate be inserted between the individuals and the police, after the "exceptional circumstances" have been removed, in order to protect the individual's privacy to the full extent provided for in the Fourth Amendment.

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by

a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Johnson v. U.S.* 333 U.S. 10, 13-14 (1948).

The foregoing reasoning also requires rejection of respondent's attempt (Resp. Br. at 107) to distinguish the *Preston* case on the ground that there the search was for evidence not relating to the arrest whereas here it turned up a piece of paper that respondent has earlier conceded was highly relevant to the crime charged. (R. 254). The closer the relationship a proposed search has to the crime for which the defendant is arrested, however, the better will be the prosecution's grounds for obtaining a search warrant, and the more unjustifiable its reasons for not taking the trouble to obtain one.

**C. THE CALIFORNIA FORFEITURE STATUTE DOES NOT PROVIDE A BASIS FOR DISTINGUISHING THIS CASE FROM PRESTON:**

The record in the present case shows only that the police took possession of defendant's car. There is no evidence that the state ever acquired title to the car, either pursuant to forfeiture proceedings or otherwise (R. 264-265), even assuming the doubtful proposition that the *Preston* case could be undercut by such a title theory. Pending a judicial determination, the forfeiture statute at the most authorized



the police to take the automobile into custody. Thus, the state's assertion of the right to search the car is based only on a right to custody. In *Preston* the state had no less interest in the defendant's car. There, as here, the police were considered to have lawful custody of the car and there, as here, the car was unlawfully searched. Cf. *United States v. Blok*, 188 F. 2d 1019 (D.C. Cir. 1951). The cases relied on by respondent for a contrary argument either failed to consider the *Preston* case, e.g., *Burge v. United States*, 333 F. 2d 210, 218-219 (9th Cir. 1964), *on rehearing*, 342 F. 2d 408, 414, *cert. denied*, 382 U.S. 829 (1965); *United States v. Ziak*, 360 F. 2d 850 (7th Cir. 1966), or merely said that *Preston* was distinguishable without suggesting any reasons why the proffered distinction was significant. E.g., *Drummond v. United States*, 350 F. 2d 983, 988 (8th Cir. 1965).

The state's contentions that its vehicle forfeiture statute<sup>6</sup> justified the search and seizure here involved are without merit for the additional reason that they are foreclosed by the District Court of Appeal's controlling construction of its own state's statute as not authorizing warrantless searches of impounded cars. The question of the proper state law construction of the state statute was fully argued

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<sup>6</sup>Calif. Health & Safety Code 11611 provides: "Any peace officer of this state, upon making or attempting to make an arrest for a violation of this division, shall seize any vehicle used to unlawfully transport any narcotic or to facilitate the unlawful transportation of any narcotic, or in which any narcotic is unlawfully kept, deposited or concealed or which is used to facilitate the unlawful keeping, depositing or concealment of any narcotic, or in which any narcotic is unlawfully possessed by an occupant thereof, or which is used to facilitate the unlawful possession of a narcotic by an occupant thereof, and shall immediately deliver such vehicle to the Division of Narcotic Enforcement of the Department of Justice to be held as evidence until a forfeiture has been declared or a release ordered."

to the District Court of Appeal and cannot and should not be relitigated here. (Cert. Rec. items 15, 18, 19, 20, 21; Petr's. Op. Br. 12 n. 5.)'

### III.

**The State's Contentions Are Without Merit That This Court Cannot and Should Not Reverse Defendant's Conviction Despite the State's Deliberate Failure to Produce Its Own Participating Informer Who Was the Only Witness Who Could Positively Identify or Exonerate Defendant.**

Respondent's contention that this Court cannot hear defendant's plea for protection of his right of confrontation is essentially that he followed the wrong form of action, namely that he presented his plea by petition for hearing to the California Supreme Court instead of by supplemental brief or petition for rehearing in the District Court of Appeal. (Resp. Br. 115.) As shown by defendant's

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' Respondent's contentions also are based in part on an inaccurate representation of the record. For example, respondent's statement that "no question has ever been raised as to the lawfulness of the arrest and seizure at any stage of the proceedings" (Resp. Br. 96) is contradicted by the record. Defendant questioned both his arrest (see R. 274) and the seizure of the car. In addition to his argument to the District Court of Appeal that the car seizure statute did not authorize the search of the car and seizure of the paper, defendant also urged that the seizure of the car itself was not justified because the arrest was made by a federal agent Yates and not a "peace officer of this state" or for a violation of a state narcotics law as required by the statute. Calif. Health & Safety Code, Sec. 11611. See Cert. Rec. item 18, pp. 13-16. The District Court of Appeal stated in its opinion, however, that defendant was taken as "a state prisoner" (R. 261) and that the car "was in lawful custody of the officers at the time of the search in question, at least under Health and Safety Code, Sec. 11611, if not on other grounds" (R. 266).

opening brief, however, further action in the District Court of Appeal was unnecessary, would have been futile, and could not fairly be expected of defendant, given the crucial change in the constitutional law of confrontation that was effected by *Pointer v. Texas*, 380 U.S. 400 (1965) after all the briefs had been filed and the argument had been heard in the District Court of Appeal.

Respondent makes one comment that might have some merit if it were applicable to the case, namely that a state court should have "a fair opportunity to squarely meet the issue" before it is presented to this Court. (Resp. Br. 118.) The same judges of the District Court of Appeal who decided the instant case, however, decided the confrontation issue adversely two days later in another case, *People v. Brooks*, 234 Cal.App.2d 662, 678, 44 Cal. Rptr. 66 (1965) and, in addition, defendant fully presented the issue to the California Supreme Court in the instant case. (Cert. Rec., item 23, pages 3-4, 17-21.) Defendant therefore turned the corners of procedure squarely and at least as sharply as, if not more than, the defendants in *Griffin v. California*, 380 U.S. 609 (1965), reversing *People v. Griffin*, 60 Cal.2d 182, 32 Cal. Rptr. 24, 383 P.2d 432 (1963) and *O'Connor v. Ohio*, — U.S. — (35 L.W. 3174, Nov. 14, 1966) and 382 U.S. 286 (1966). His claim accordingly is properly before this Court.

On the merits, respondent's argument also is untenable:

1. Respondent contends that cases relied on by defendant<sup>a</sup> depend on an entrapment defense and that "the

<sup>a</sup> *Lopez v. United States*, 373 U.S. 427, 444-445 (1963). (concurring opinion of Chief Justice Warren); *United States v. Clarke*, 220 F.Supp. 905 (E.D. Pa. 1963); *United States v. Ramsey*, 220 F.Supp. 86 (E.D. Tenn. 1963).

established rule under both California and federal law is that the defense of entrapment must affirmatively be put in issue at the trial level before it can be raised on appeal. In the instant case, it was not even presented on appeal and respondent accordingly contends that the conclusion of waiver is inescapable." (Resp. Br. 125-126.)

The foregoing quoted statement misstates the law and the record.

At the time of defendant's trial and prior to *People v. Perez*, 62 Cal.2d 769, 775-776, 44 Cal.Rptr. 326, 401 P.2d 934 (1965), a defendant in a criminal case in California was required "to admit guilt as a condition to invoking the defense of entrapment." 62 Cal.2d at 776. Because the *Perez* case changed the law, California defendants may raise an entrapment question for the first time on appeal if their trials occurred before the *Perez* case. See, e.g., *People v. Marsden*, 234 Cal.App.2d 796, 799-800, 44 Cal.Rptr. 728 (1965). Defendant in the instant case did so in his petition for hearing to the California Supreme Court and argued, among other points, that production of the informer as a prosecution witness was essential to determine whether a defense of entrapment existed and, if so, to lay the basis for that defense under the *Perez* case without admitting guilt. (Cert. Rec. item 23, p. 20.)

2. It is no answer for respondent to point out that defendant knew the identity of the informer and that the informer was "available." (Resp. Br. 123.) He was only available upon release from the county jail under a court order conditioned on a showing of the materiality of the expected testimony. Calif. Code Civ. Proc. §1995; 28 Ops. Cal. Atty. Gen. 59 (1956). Furthermore, under present



California law, a party producing a witness is deemed to vouch for his credibility, *People v. Porterfield*, 186 Cal.App. 2d 149, 157-159, 8 Cal.Rptr. 897 (1960), and a party may not impeach his own witness by evidence of bad character. Calif. Code Civ. Proc. §2049. Moreover, a party may impeach his own witness by his prior inconsistent statements only where the party is able to show that he is both surprised and damaged by the witness' testimony given in court. *People v. Kidd*, 56 Cal.2d 759, 765-766, 16 Cal.Rptr. 793, 366 P.2d 49 (1961); cf. Calif. Evid. Code §785 (which will become effective on January 1, 1967). Although California Code of Civil Procedure section 2055 allows a party to call certain witnesses as adverse witnesses with the right of cross-examination, this code section applies only to civil actions and proceedings and not to criminal actions. *Oliver v. Superior Court*, 197 Cal.App.2d 237, 240, 17 Cal.Rptr. 474 (1961). Therefore, if defendant had called the informer as a witness, he would have had to make the informer his own witness and vouch for his credibility and his good character. See also *Lopez v. United States*, 373 U.S. 427, 445 (1963) (concurring opinion of Chief Justice Warren). Respondent's attempt to shift instead of "shoulder the entire load," *Tehan v. Shott*, 382 U.S. 406 (1966) denied to defendant his crucial right of confrontation.

3. Even more harmful to the right of confrontation than respondent's foregoing mistaken representations of the record and California law in this particular case are its general contentions (a) that the prosecution has no obligation to produce its own participating informer as a witness at the trial even though that informer is the only person who can positively identify or exonerate a defendant and (b) that if there is such an obligation, it is strictly limited not

only to cases in which the defendant pleads entrapment but also by the technicalities governing the hearsay rule. (Resp. Br. 118-126.)

Defendant's claim, however, is not simply that he was deprived of an opportunity to raise an entrapment defense and that hearsay evidence was used to convict him, important as these points are in the instant case. Defendant's confrontation claim goes to the requirements of basic fairness in a criminal prosecution.

Notwithstanding respondent's glowing claims for training programs (Resp. Br. 53-54), the record in this case presents a dismal picture of lawless, questionable, and negligent law enforcement, a picture that places the confrontation claim in appropriate perspective.<sup>9</sup>

The police commenced their activities against defendant by eavesdropping on a private phone located at his home. (R. 192-193, R. 61-62.) They next engaged in the sordid practice of "interrogating" an unreliable and untrustworthy informer (R. 127, 59-60) for several hours, obtaining his agreement thereafter to act as a police decoy and cat's paw in crime (R. 257-258),<sup>10</sup> and following up that agreement by reducing a charge against him from sale of heroin to

<sup>9</sup> The facts are stated in summary and as necessary background only and not to "smuggle additional questions into a case" that were not fairly raised in the petition for a writ of certiorari. *Irvine v. California*, 347 U.S. 128, 129, 130 (1954).

<sup>10</sup> The record does not reveal the extent to which "police pressure [was] brought to bear to persuade [him] to turn informer," *Lopez v. United States*, 373 U.S. 427, 444 (1963) (concurring opinion of Chief Justice Warren) or whether any of the required warnings were given to the informer prior to his interrogation. Cf. *Miranda v. Arizona*, — U.S. — (1966); *Jones v. United States*, 362 U.S. 257, 265 (1960); *People v. Dorado*, 62 Cal.2d 338, 42 Cal. Rptr. 169, 398 P.2d 361, cert. denied, 381 U.S. 937, 946 (1965).

possession. (R. 127-28.) See *Lopez v. United States*, 373 U.S. 427, 444 (1963) (concurring opinion of Chief Justice Warren). The police then eavesdropped, once again, on the informer's phone call to a private home (R. 258)<sup>11</sup> and set up what is known as the "affirmative trap" in narcotics cases.<sup>12</sup> The police aimed to administer the trap through the use of constant surveillance by three officers and marked money but such constant surveillance was not achieved, the marked money was not found, the testimony of the officers was in conflict, and no officers positively identified defendant. (See Petr's. Op. Br. 14-17.) The officers then failed to catch their suspect at the scene of the purported narcotics transaction. (R. 260.) After federal agent Yates arrested the defendant later in the afternoon, the police pressed him to the hood of his car, lacerated his nose and

<sup>11</sup> As Chief Justice Warren's concurring opinion in *Lopez v. United States*, 373 U.S. 427, 444 (1963) makes clear, the use of participating informers and eavesdropping on the informer's conversations coupled with nonproduction of the informer at the trial are closely related police practices that raise serious questions of invasion of protected communications and fundamental fairness in criminal prosecutions. Defendant specifically raised an eavesdropping question that was decided adversely to him in the District Court of Appeal. That question was not specifically raised in the petition for certiorari except insofar as the confrontation question herein raised fairly includes it under the theory of the concurring opinion in the *Lopez* case. Defendant notes that the Court now has before it cases, *Osborne v. United States*, No. 29, and *Hoffa, et al. v. United States*, Nos. 32-35, that may also bear on these questions. Cf. also *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Boynton v. Virginia*, 364 U.S. 454, 457 (1960); *Pollard v. United States*, 352 U.S. 354, 359 (1957).

<sup>12</sup> The District Court of Appeal in two sentences disposed of defendant's position that the trap was unconstitutional (R. 271) but other writers find more difficulties with its use, see Note, *The Constitutional Status of the Entrapment Defense*, 74 Yale L.J. 942 (1965) and even the police find a first trap sale "faulty from an evidentiary point of view" if the marked money as in the instant case, is not found. See Comment, *Administration of the Affirmative Trap*, 31 U. Chi. L. Rev. 137, 156 at n. 83.

loosened his teeth (R. 97-98, R. 201-202, 214-218, 220-221, 223-225, 229-230) and took him to the police station for an unconstitutional interrogation. (R. 272-273.) Defendant then suffered an unconstitutional search of his car and seizure of a crucial piece of brown paper that the prosecution unconstitutionally used as evidence against him at the trial. (R. 263-269.) The prosecution did not even make any effort to show scientifically that the police-controlled paper came from the same source as the brown paper that wrapped the bindles that defendant was accused of selling. (See text at n. 3, *supra*.) The prosecution then deliberately failed to produce the "key figure in this prosecution," *United States v. Clarke*, 220 F.Supp. 905, 909 (E.D. Pa. 1963), namely the government's unreliable and untrustworthy informer, even though he was available and even though confrontation and cross-examination were essential to the defense. (See Petr's. Op. Br. 43-47.)<sup>13</sup>

<sup>13</sup> The last act of the police has been to destroy the piece of brown sack paper that brought this case here, an act accomplished despite the express order of the District Court of Appeal augmenting the record to include the paper and the other exhibits (Cert. Rec. item 10) and despite the facts that defendant's direct appeal rights to this Court had not been exhausted, that his petition for a writ of certiorari was on file, and that the statutory one-year waiting period for disposal of documentary evidence had not yet expired. Calif. Pen. Code §1418.5. The information concerning this destruction of the paper was requested of and graciously furnished by the California Attorney General's office in a letter to petitioner's counsel that the State Bureau of Narcotic Enforcement destroyed the piece of brown sack paper along with the other material in exhibits 4 and 7 apparently in accordance with a superior court order dated September 23, 1965 (see also Cert. Rec. item 26), a type of order that the state customarily obtains *ex parte*. The paper was apparently treated as a disposable "narcotic," Calif. Health & Saf. Code §11653, and its treatment by the police as such illustrates again the close connection that they felt existed between the heroin turned over by the informer and the illegally seized paper. On premature destruction of exhibits, see generally Note, *Disposition of Physical Exhibits Used in Criminal Trials*, 20 Wash. & Lee L. Rev. 67 (1963).



The state deployed each "weapon in [its] arsenal of detection" (Resp. Br. 101) against defendant in this case and then forced him to defend without the shield of confrontation and cross-examination. The conviction it obtained in this manner must be reversed, not only to observe the rudimentary guaranties of the United States Constitution that were not observed here but to see that justice is done to an accused, as it was not done in this case.

### Conclusion

Training programs for police and prosecutors are of vital importance. Respondent is to be commended for being a leader in developing such programs. It would be a great day for constitutional rights if all states had such programs and if they were successful.

Defendant respectfully submits, however, that training programs are not enough. Some trainees do not learn their lessons. For those who do not, what is needed is a decision in this case that will protect the Fourth Amendment rights of all persons suspected of crime, and their right to confront and cross-examine the witnesses against them, from police and prosecutors who are either ignorant of or refuse to respect those rights. Such a decision will not interfere with any state's law enforcement programs at all, if state officials respect a man's rights under the United States Constitution, as they did not in this case.

For the reasons stated herein and in the opening brief, the judgment of the District Court of Appeal should be reversed with directions to reverse the judgment of the trial court.

Respectfully submitted,

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*By appointment*

November 25, 1966.



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**PETITION FOR MODIFICATION OF OPINION  
AND FOR REHEARING**

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**UNDER THE COURT'S OPINION ON THE MERITS, THE ONLY  
APPROPRIATE DISPOSITION IS TO VACATE AND REMAND,  
NOT TO AFFIRM.**

The California District Court of Appeal decided that the search of petitioner's impounded car and the seizure of evidence for a criminal prosecution were unauthorized by the state vehicle forfeiture statute and unconstitutional under *Preston v. United States*, 376 U.S. 364 (1964) but that the use of the seized evidence was harmless.

This Court affirmed.

It is respectfully submitted, however, that affirmance is not an appropriate disposition and that the only appropriate disposition under the Court's opinion on the merits is to vacate the judgment below and to remand the cause to the California District Court of Appeal.

1. The California court's decision on the constitutional point was not affirmed because this point was held "erroneously decided." Adv. Op., p. 1.

2. The California court's decisions on statutory construction and harmless error were not affirmed because these are matters of state law and were not decided under the Court's opinion.

3. In similar cases, when this Court has held that the state court is free of the federal compulsion it erroneously invoked, the judgment below has been vacated and the cause remanded so that the state

court can reconsider the state grounds and "be free to act." *State Tax Comm'n v. Van Cott*, 306 U.S. 511, 514-516 (1939); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1 (1950); *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26 (1957); cf. *Patterson v. Alabama*, 294 U.S. 600, 606-608 (1935); *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942); *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940); *Bell v. Maryland*, 378 U.S. 226, 238-241 (1964); *Henry v. Mississippi*, 379 U.S. 443 (1965); *Watts v. Seward School Bd.*, 381 U.S. 126 (1965); *Dept. of Mental Hygiene v. Kirchner*, 380 U.S. 194 (1965). See also *Union Trust Co. v. Eastern Airlines, Inc.*, 350 U.S. 962 (1956). See generally Note, 74 Harv.L.Rev. 1375 (1961); Sandalow, *Henry v. Mississippi and the Adequate State Ground*, 1965 Sup. Ct. Rev. 187; Note 49 Yale L. J. 1463 (1940).

4. Vacating and remanding will permit the California court to impose the higher standard of a warrant in this case, to reconsider its harmless error rule for violations of such standards in light of *Chapman v. California*, No. 95, and to reconsider its application of such a rule to a petitioner whose conviction "rested in part" on evidence that may still be illegal in California. See Adv. Op. p. 1; e.g., *Dept. of Mental Hygiene v. Kirchner*, 62 Cal.2d 586, 400 P.2d 321 (1965), after vacation and remand in 380 U.S. 194 (1965); cf. the adoption of higher standards in illegal evidence cases in *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905 (1955), after *Wolf v. Colorado*, 338 U.S. 25 (1949),

and before *Mapp v. Ohio*, 367 U.S. 643 (1961). Affirmance unnecessarily forecloses such reconsideration.

5. Vacating and remanding will permit the California court to clarify the California law on searching cars impounded under the vehicle forfeiture statute. Affirmance leaves that law unclear. See Calif. Rule of Court No. 24(a) (finality of decision); *Scoville v. Kegl*, 29 Cal.App.2d 66, 67, 84 P.2d 212 (1938) (same). A California police officer may learn that the search in this case was held constitutional but if he attempts similar searches he will not know whether he is violating a California law of higher standards.

6. Vacating and remanding will also permit the California court to fully consider whether the seizure was valid. Although it said in passing that the car was in lawful custody (R. 266), it also made clear that the record disclosed no forfeiture proceedings (R. 261) and it did not rule on the following specific, now critical, questions under Health and Safety Code section 11611: (1) Whether the arrest on December 21, 1961 by federal agent Yates (R. 88, 89, 113, 260), was the required arrest by a "peace officer of this State." See Pen. Code § 817; *People v. Yet Ning Yee*, 145 Cal.App.2d 513, 516-517, n. 4, 302 P.2d 616 (1956). (2) Whether federal agent Yates was even authorized to make an arrest for violation of a state narcotics law, as required by section 11611. See 26 U.S.C.A. § 7607 (Supp. 1966); cf. *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950), cert. denied, 342 U.S. 920



(1952); Cert. Rec. item 18, pp. 13-15 (brief below).

(3) Whether the seizure on December 21, 1961 was sufficiently contemporaneous with the actual arrest by a state agent that occurred on December 26, 1961, 5 days after the arrest by federal agent Yates. See attached copy of the arrest warrant from Richmond Municipal Court. See also *People v. One 1939 Buick Coupe*, 56 Cal.App.2d 163, 166-167, 132 P.2d 308 (1942) (strict construction of forfeiture statute); *People v. One 1950 Mercury Sedan*, 116 Cal.App.2d 746, 749, 254 P.2d 666 (1953) (same).

Because the court below held the search of the car invalid, it was immaterial whether the underlying seizure of the car was valid until the *Preston* case was distinguished on this point in this Court's opinion. The validity of the seizure was never thoroughly considered in the courts below or unequivocally established by the evidence. Vital constitutional rights should not be lost in this manner.

#### CONCLUSION

An affirmance stops the California court from applying higher search and seizure standards in this case, from reconsidering its harmless error rules in light of *Chapman*, from eliminating the uncertainty now left in California law, and from ever considering thoroughly the now crucial and material question whether the underlying seizure of the car was valid. There is no good reason for such a result particularly since no specific holding of the California court

was affirmed and since such a result is easily avoidable by vacating, and remanding under well-established principles of this Court.

It is respectfully submitted that the petition for modification of opinion and for rehearing should be granted and that the judgment of the California District Court of Appeal should be vacated and the cause remanded to that court.

Dated, San Francisco, California,  
March 8, 1967.

MICHAEL TRAYNOR,  
*Counsel for Petitioner*  
*By appointment.*

JARED G. CARTER,  
ANTHONY C. GILBERT,  
DONALD H. MAFFLY,  
PREBLE STOLZ,  
*Of Counsel.*

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#### CERTIFICATE OF COUNSEL

I, Michael Traynor, certify that the foregoing petition for modification of opinion and for rehearing is presented in good faith and not for delay.

MICHAEL TRAYNOR,  
*Counsel for Petitioner*  
*By appointment.*

(Appendix Follows)

IN THE  
MUNICIPAL COURT OF THE JUDICIAL DISTRICT  
OF THE CITY OF RICHMOND,  
COUNTY OF CONTRA COSTA, STATE OF CALIFORNIA

THE FOREGOING INSTRUMENT IS A CORRECT  
COPY OF THE ORIGINAL ON FILE IN THIS  
OFFICE.

The People of the State of California,

Plaintiff,

vs.

JOE COOPER

Defendant.

The People of the State of California,

To any Sheriff, Constable, Marshal or Policeman in this State:

Complainant upon oath having been this day made before me,

CHAS. H. BALDWIN Judge of The Municipal Court of the City of Rich-

mond, in said County of Contra Costa, by HOWARD GROOM

that the offense of FELONY, TO WIT: VIOLATION OF SECTION 11501 CALIFORNIA  
HEALTH AND SAFETY CODE AND SECTION 220 CALIFORNIA PENAL CODE

has been committed, and accusing

JOE COOPER thereof.

You are therefore commanded forthwith to arrest the above named

DEFENDANT

and bring HIM before me forthwith in Department No. 3 of said Municipal Court, Hall  
of Justice, Civic Center, Richmond, California, or in case of my absence or inability to act, before  
the nearest and most accessible magistrate in this county.

The defendant is to be admitted to bail in the sum of \$ 2,000.00 + PA \$100.00

Witness my hand and the seal of said Municipal Court, at Richmond,

California, this 26th day of December

1961 at the hour of 1:50 o'clock P M., and I direct

that this warrant may be served at any hour of the day or night.

James H. Baldwin  
Judge of the Municipal Court of the Judicial District of the City of Richmond.

The above warrant was received on the 26 day of December, 1961, and the said

arrested thereon at Richmond

day of December, 1961, and brought before the above-entitled Court this

day of \_\_\_\_\_, 19\_\_\_\_.

The said defendant Joe Cooper having been brought before me on this warrant declares HIS true  
name to be JOE COOPER and said defendant is hereby  
committed to the custody of the SHERIFF

County of Contra Costa, until HE can be tried or examined on said charge, and HE  
admitted to bail in the sum of \$ 2000.00 plus FE and stands committed until \_\_\_\_\_ gives  
such bail.

Dated December 26, 1961

James H. Baldwin  
Judge of the Municipal Court of the Judicial District  
of the City of Richmond.

MAR 6 1967

ATTORNEY

JAMES L. LUNDGREN, CLERK OF THE MUNICIPAL  
COURT OF THE CITY OF RICHMOND, STATE  
OF CALIFORNIA.

122160

By Marie Mayfield  
Deputy Clerk



# SUPREME COURT OF THE UNITED STATES

No. 103.—OCTOBER TERM, 1966.

Joe Nathan Cooper, Petitioner, | On Writ of Certiorari to  
v. | the Supreme Court of  
State of California. | California.

[February 20, 1967.]

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner was convicted in a California state court of selling heroin to a police informer. The conviction rested in part on the introduction in evidence of a small piece of a brown paper sack seized by police without a warrant from the glove compartment of an automobile which police, upon petitioner's arrest, had impounded and were holding in a garage. The search occurred a week after the arrest of petitioner. Petitioner appealed his conviction to the California District Court of Appeal which, considering itself bound by our holding and opinion in *Preston v. United States*, 376 U. S. 364, held that the search and seizure violated the Fourth Amendment's ban of unreasonable searches and seizures. That court went on, however, to determine that this was harmless error under Art. VI, § 4½, of California's constitution which provides that judgments should not be set aside or reversed unless the court is of the opinion that the error "resulted in a miscarriage of justice." 234 Cal. App. 2d 587. The California Supreme Court declined to hear the case. We granted certiorari along with No. 95, *Chapman v. California*, ante, to consider whether the California harmless-error constitutional provision could be used in this way to ignore the alleged federal constitutional error. 384 U. S. 904. We have today passed upon the question in No. 95, but do not reach it in this case because we are satisfied that the lower court erroneously decided that



our *Preston* case required that this search be held an unreasonable one within the meaning of the Fourth Amendment.

We made it clear in *Preston*, that whether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case and pointed out, in particular, that searches of cars that are constantly movable may make the search of a car without a warrant a reasonable one although the result might be the opposite in a search of a home, a store, or other fixed piece of property. 376 U.S., at 366-367. In *Preston* the search was sought to be justified primarily on the ground that it was incidental to and part of a lawful arrest. There we said that "once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." *Id.*, at 367. In the *Preston* case, it was alternatively argued that the warrantless search, after the arrest was over and while *Preston's* car was being held for him by the police, was justified because the officers had probable cause to believe the car was stolen. But the police arrested *Preston* for vagrancy, not theft, and no claim was made that the police had authority to hold his car on that charge. The search was therefore to be treated as though his car was in his own or his agent's possession, safe from intrusions by the police or anyone else. The situation of petitioner's car is quite different.

Here, California's Attorney General concedes that the search was not incident to an arrest. It is argued, however, that the search was reasonable on other grounds. Section 11611 of the California Health and Safety Code provides that any officer making an arrest for narcotics violation shall seize and deliver to the State Division of Narcotic Enforcement any vehicle used to store, conceal,

transport, sell or facilitate the possession of narcotics, such vehicle "to be held as evidence until a forfeiture has been declared or a release ordered." (Emphasis supplied.) Petitioner's vehicle, which evidence showed had been used to carry on his narcotics possession and transportation, was impounded by the officers and their duty required that it be kept "as evidence" until forfeiture proceedings were carried to a conclusion. The lower court concluded, as a matter of state law, that the state forfeiture statute did not by "clear and express language" authorize the officers to search petitioner's car. 234 Cal. App. 2d, at 598. But the question here is not whether the search was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment. Just as a search authorized by state law may be an unreasonable one under that amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one. While it is true, as the lower court said, that "lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it," *ibid.*, the reason for and nature of the custody may constitutionally justify the search. Preston was arrested for vagrancy. The arresting officers took his car to the station simply because they did not wish to leave it on the street. It was not suggested that they did

<sup>1</sup> Cal. Health & Safety Code § 11610 provides:

"The interest of any registered owner of a vehicle used to unlawfully transport or facilitate the unlawful transportation of any narcotic, or in which any narcotic is unlawfully kept, deposited, or concealed or which is used to facilitate the unlawful keeping, depositing or concealment of any narcotic, or in which any narcotic is unlawfully possessed by an occupant thereof or which is used to facilitate the unlawful possession of any narcotic by an occupant thereof, shall be forfeited to the State."

this other than for Preston's convenience or that they had any right to impound the car and keep it from Preston or whomever he might send for it. The fact that the police had custody of Preston's car was totally unrelated to the vagrancy charge for which they arrested him. So was their subsequent search of the car. This case is neither *Preston* nor controlled by it. Here the officers seized petitioner's car because they were required to do so by state law. They seized it because of the crime for which they arrested petitioner. They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. Their subsequent search of the car—whether the State had "legal title" to it or not—was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained. The forfeiture of petitioner's car did not take place until over four months after it was lawfully seized. It would be unreasonable to hold that the police, having to retain the car in their garage for such a length of time, had no right, even for their own protection, to search it. It is no answer to say that the police could have obtained a search warrant, for "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *United States v. Rabinowitz*, 339 U. S. 56, 66. Under the circumstances of this case, we cannot hold unreasonable under the Fourth Amendment the examination or search of a car validly held by officers for use as evidence in a forfeiture proceeding.

Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so. And when such state standards alone have been violated, the State is free, without review by

us, to apply its own state harmless-error rule to such errors of state law. There being no federal constitutional error here, there is no need for us to determine whether the lower court properly applied its state harmless-error rule.\*

*Affirmed.*

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\* Petitioner also presents the contention here that he was unconstitutionally deprived of the right to confront a witness against him, because the State did not produce the informant to testify against him. This contention we consider absolutely devoid of merit.





# SUPREME COURT OF THE UNITED STATES

No. 103.—OCTOBER TERM, 1968.

Joe Nathan Cooper, Petitioner, | On Writ of Certiorari to  
v. | the Supreme Court of  
State of California. | California.

[February 20, 1967.]

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE, MR. JUSTICE BRENNAN and MR. JUSTICE FORTAS concur, dissenting.

When petitioner was arrested, his auto was seized by officers, pursuant to the California Health and Safety Code, § 11611. That section authorizes a state officer making an arrest for violation of the narcotics laws to seize a "vehicle used to unlawfully transport any narcotic or to facilitate the unlawful transportation of any narcotic, or in which any narcotic is unlawfully kept," and directs the officer to deliver the vehicle to the Division of Narcotic Enforcement "to be held as evidence until a forfeiture has been declared or a release ordered." About a week after petitioner's arrest, a state agent searched the car, which was stored at a tow service, and discovered a piece of brown paper which appeared to have been torn from a grocery bag. This piece of paper was introduced at the trial, along with two bundles of heroin, which petitioner allegedly sold an informer, and the brown paper in which the heroin had been wrapped.<sup>1</sup> Petitioner was indicted and convicted of selling heroin. A judgment of forfeiture of petitioner's car was entered the day after the termination of his trial.

<sup>1</sup> About four months after the arrest, another agent searched the car and found a marijuana seed, which was introduced at trial. There is no objection to this evidence since there was no jury and the trial judge indicated that the marijuana seed was irrelevant to the charge for which petitioner was being tried.

The California District Court of Appeal held that the piece of paper bag was the product of an illegal search, 234 Cal. App. 2d 587, 44 Cal. Rptr. 483. First, the state court held that the State could not rely on the subsequent forfeiture to justify the search. It realistically noted that the State's title could not relate back to the time of the seizure until after a judicial declaration of forfeiture. Since the forfeiture judgment was not entered until after petitioner's trial, the State could not rely on it to justify the search. *Id.*, at 596-597, 44 Cal. Rptr., at 489-490. Second, the court held that although the automobile was in the lawful custody of the officers at the time of the search, § 11611 of the Health and Safety Code did not authorize the officers to search the car. *Id.*, at 597, 44 Cal. Rptr., at 490. Since the search was not pursuant to a warrant, and since it was not incidental to petitioner's arrest, it was illegal.

Hence the fact that the car was being held "as evidence" did not as a matter of state law give the officers more dominion over it than the officers in *Preston v. United States*, 376 U. S. 364, had over the car in their custody.

In *Preston*, petitioner and others were arrested for vagrancy after they failed to give an acceptable explanation of their presence in a parked car late at night. They were taken to the police station, and the car was taken first to the station and then to a garage. After the men were booked, police officers went to the garage, searched the car without a warrant, and found evidence incriminating petitioner and the others of conspiracy to rob a federally insured bank.

In the instant case petitioner was arrested, his car taken to a garage and searched a week after his arrest, likewise without a warrant. As in *Preston*, the search cannot be justified as incidental to a lawful arrest. Nor can this case be distinguished from *Preston* on the ground

that one car was lawfully in police custody and the other not. In *Preston*, the fact that the car was in lawful police custody did not legalize the search without a warrant. Since the California court held that the Health and Safety Code did not authorize a search of a car impounded under its provisions, the case is on all fours with *Preston* so far as police custody is concerned. If custody of the car is relevant at all, it militates against the reasonableness of the search. As the Court said in *Preston*: "[S]ince the men were under arrest at the police station and the car was in police custody at a garage, [there was no] danger that the car would be moved out of the locality or jurisdiction." 376 U. S., at 368. Moreover, the claim that the search was not illegal because the car had been forfeited to the State is foreclosed by the state court's holding that, under the circumstances, the forfeiture could not relate back to the date of the seizure. The state court's interpretation of its own statute will not be upset by this Court. *Guaranty Trust v. Blodgett*, 287 U. S. 509.

To repeat, this case is on all fours with *Preston*. For in each the search was of a car "validly" held by officers, to use the Court's expression. *Preston*, of course, was a federal case, while this is a state case. But the Fourth Amendment with all its sanctions applies to the States as well as to the Federal Government. *Mapp v. Ohio*, 367 U. S. 643.

I see only two ways to explain the Court's opinion. One is that it overrules *Preston sub silentio*. There are those who do not like *Preston*. I think, however, it states a healthy rule, protecting the zone of privacy of the individual as prescribed by the Fourth Amendment. These days police often take possession of cars, towing them away when improperly parked. Those cars are "validly" held by the police. Yet if they can be searched without a warrant, the precincts of the individual are



invaded and the barriers to privacy breached. Unless the search is incident to an arrest, I would insist that the police obtain a warrant to search a man's car just as they must do when they search his home.

If the present decision does not overrule *Preston*, it can perhaps be rationalized on one other ground. There is the view that when the Bill of Rights is applied to the States by reason of the Fourteenth Amendment, a watered-down version is used. In that view "due process" qualifies all provisions of the Bill of Rights. Today's decision is perhaps explicable in those terms. But I also reject that view. "Unreasonable searches and seizures" as used in the Fourth Amendment, "self-incrimination" as used in the Fifth, "freedom of speech" as used in the First, and the like, mean the same in a state as in a federal case.

That view was expressly approved by the Court in *Malloy v. Hogan*, 378 U. S. 41, 10-11.